Doing Business in Canada

Navigating Opportunities for Investment and Growth

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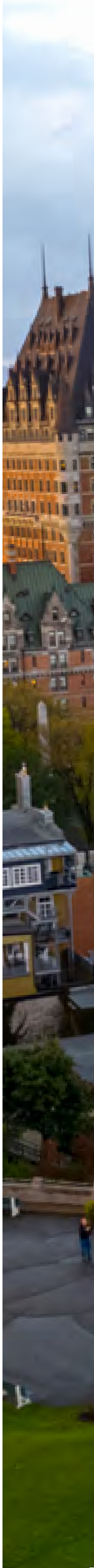

INTRODUCTION

Successfully establishing a business or expanding into one of Canada's many thriving sectors requires deep industry expertise and an understanding of the unique federal and provincial regulatory landscape. For those entering the Canadian market for the first time or in a new industry, questions will inevitably arise: what are the key considerations when planning to establish or acquire a business in Canada? What are the potential opportunities, and where are the possible pitfalls?

Doing Business in Canada was developed by McCarthy Tétrault as a guide to the legal aspects of establishing or acquiring a business in Canada. Our guide provides a general overview of the latest Canadian laws and regulations and is designed to help businesses successfully enter the Canadian market. Starting with an overview of the Canadian political and legal systems, the guide proceeds through the areas of law most likely to affect your business decisions: foreign investment, international trade, corporate finance, mergers & acquisitions, competition, taxation, intellectual property, real property and others.

The discussion in each section covers general guidance for businesses and is not an exhaustive analysis of all provisions of relevant Canadian law. For this reason, we recommend that you seek the advice of one of our lawyers on the specific legal aspects of your proposed investment or activity. With offices in Canada's major commercial centres, McCarthy Tétrault has the national presence and capabilities to help you successfully complete any business transaction in Canada.

Unless otherwise indicated, the information in this publication is current as of July 2023.

For further information or any questions about this guide, please contact Shea Small, Karl Tabbakh, Matthew Cumming or Patrick Shea.

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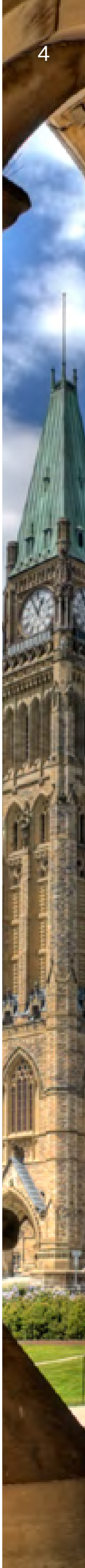


CANADA

Canada is the second-largest country in the world, with an area of approximately 10 million square kilometres and a population of more than 37 million. The vast majority of its population resides within about 150 kilometres of its southern boundary with the United States, much of it in the highly industrialized corridor between Windsor, Ontario and Québec City, Québec. Canada's two official languages are English and French. As one of the 10 largest economies of the industrialized countries, Canada is a member of the world's Group of Seven (G7) industrialized nations. Currently, approximately three quarters of Canada's exports go to the United States, and under 5% to each of the European Community, the United Kingdom and China. Canada is the largest importer of goods and services from the United States, with imports from the U.S. comprising approximately half of all Canadian imports.

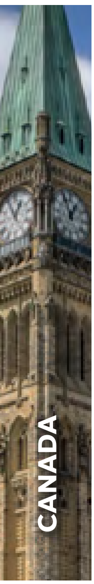
The Toronto Stock Exchange (TSX) and the TSX Venture Exchange rank third among North American exchanges and ninth among world stock exchanges in terms of market capitalization. More resource company stocks are listed on the TSX than anywhere else in the world.

Canada is a federal state, with governmental jurisdictions divided among a national government, 10 provincial governments and three territorial governments. The *Constitution Act, 1867* provides the federal and provincial governments with exclusive legislative control over enumerated lists of subjects and also provides exclusive legislative control to the federal government over residual subjects not clearly assigned to the provincial governments. Each of Canada's two levels of government is supreme within its particular area of legislative jurisdiction, subject to the limits provided by the *Canadian Charter of Rights and Freedoms*, which forms part of the *Constitution Act, 1982*.

CANADA IS A FEDERAL STATE, WITH GOVERNMENTAL JURISDICTIONS DIVIDED AMONG A NATIONAL GOVERNMENT, 10 PROVINCIAL GOVERNMENTS AND THREE TERRITORIAL GOVERNMENTS.

The federal government has legislative jurisdiction over, among other matters, the regulation of trade and commerce, banking and currency, bankruptcy and insolvency, intellectual property, criminal law and national defence. The provincial governments have legislative jurisdiction over, among other matters, real and personal property, civil rights, education, health care and intra-provincial trade and commerce. Certain aspects of these provincial powers are delegated to municipal governments, which enact their own bylaws.

Both levels of government are based on the British parliamentary system. At the federal level, the prime minister is the head of government and at the provincial level, the premiers. These individuals are the leaders of the political parties that have either the greatest number of seats in the House of Commons or the provincial legislatures, respectively — or that have, at a minimum, the support of a majority of the members of the House of Commons or provincial legislatures, respectively.



When establishing or acquiring a business in Canada, one must be concerned with the federal laws as well as the laws of the provinces or territories within which the business will be conducted. In nine of the 10 provinces and in the three territories, the legal systems are based on common law. In Québec, the legal system is based on civil law. In this publication, we have chosen to refer primarily to Ontario legislation, but the legislation and programs of the other common law provinces are similar to those of Ontario. We have included references to Québec legislation — in particular, under the heading **Language**. Lawyers in the various offices of McCarthy Tétrault would be pleased to conduct a review of the federal and provincial laws and regulations and municipal bylaws relevant to your particular business operation.

Canada is also home to a wide variety of Indigenous Peoples and groups, including First Nations, Inuit and Métis. Indigenous people can be found across the country, particularly on the many traditional territories of their communities; communities with distinct culture and traditions that influence their interactions with Canadian institutions. Our chapter on **Aboriginal Law** elaborates on the unique legal challenges which arise from working with and respecting Indigenous Peoples.

BUSINESS ORGANIZATIONS

By Sven Milelli and Glynnis Morgan

BUSINESS ORGANIZATIONS

A wide variety of legal arrangements may be used to carry on business activity in Canada. Some of the more commonly used arrangements are corporations, limited partnerships, partnerships, trusts, co-ownerships, joint ventures and unlimited liability companies.

The selection of the appropriate form of business organization will depend in each case upon the circumstances of the investor, the nature of the activity to be conducted, the method of financing, income tax ramifications and the potential liabilities related to the activity.

Generally, one of the first issues faced by a foreign entity contemplating carrying on business in Canada is whether to conduct the business directly in Canada as a Canadian branch of its principal business or to create a separate Canadian entity to carry on the business. The following issues should be taken into consideration before making this decision:

— the treatment of Canadian business income for tax purposes in the investor's home country;

— the advisability of isolating the assets of the principal business from claims arising out of the Canadian business;

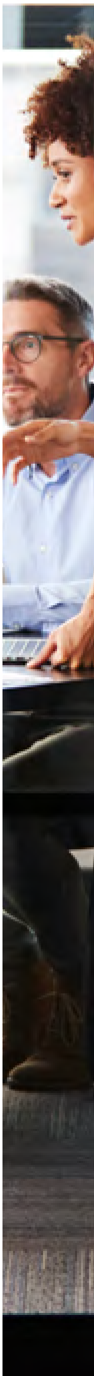
— whether one or more parties will own the Canadian enterprise;

— criteria to access federal, provincial and municipal government incentive programs; and

— Canadian tax considerations.

A foreign entity carrying on a branch operation in Canada must be registered in each of the provinces and territories in which it carries on business. In addition, foreign entities must complete many of the same disclosures and filings with the federal, provincial and territorial governments as are required of Canadian corporations.

Of the forms of business organization referred to above, the corporation with share capital is the entity most often used to carry on commercial activities in Canada. Unlike the limited partnership, partnership, trust, co-ownership or joint venture, the corporation is a legal entity separate from its owners. The shareholders do not own the property of the



corporation, and the rights and liabilities of the corporation are not those of the shareholders. The liability of the shareholders is generally limited to the value of the assets they have invested in the corporation to acquire their shareholdings. In addition to the advantages of limited liability, the securities of a corporation are generally more readily marketable. As a result, corporate shares (and debt instruments) are often seen as more attractive investments than units in partnerships or joint ventures. In some situations, there may also be tax advantages to using a corporation.

CORPORATE SHARES (AND DEBT INSTRUMENTS) ARE OFTEN SEEN AS MORE ATTRACTIVE INVESTMENTS THAN UNITS IN PARTNERSHIPS OR JOINT VENTURES.

Unlike a corporation, a partnership is not a separate legal entity, but a relationship that exists between the parties who carry on business in common with a view to profit. Partners share in the profits, losses and net proceeds on dissolution. The most significant advantage of a partnership is that it is generally permitted to “flow through” losses to its partners that may, subject to certain rules in the *Income Tax Act* (Canada), be used as deductions against the partners’ other income. The most significant disadvantage of a general partnership is that each of the partners is personally liable for the liabilities of the partnership, and their personal assets are exposed in the event the partnership assets are insufficient to cover such liabilities. The exposure of a partner to liability can be minimized by using a limited partnership rather than a general partnership. In a limited partnership, the liability of a limited partner is limited to the extent of its investment in the partnership, so long as it takes a passive role in the business and governance of the limited partnership.

In each case, the selection of the form of business organization best suited to carry on business in Canada will depend entirely on individual circumstances.

Where a corporation is the preferred vehicle for carrying on business within Canada, consideration must be given to the appropriate jurisdiction for incorporation. The nature of a corporation’s particular undertaking (e.g., banking) may be such that it falls within the exclusive legislative purview of either the federal or provincial governments, with an attendant requirement to incorporate under a specific statute.

However, corporations not specifically subject to such legislation may be incorporated under the federal laws of Canada or under the laws of any one of the provinces or territories.

The principal federal corporate statute is the *Canada Business Corporations Act* (CBCA), which is modelled on modern business statutes in the United States. Most provinces and territories in Canada also have their own corporate legislation, based largely on the CBCA. There are minor differences between the various federal, provincial and territorial corporate statutes that can affect the choice of jurisdiction of incorporation, depending upon the particular circumstances.

> THERE ARE MINOR DIFFERENCES BETWEEN THE VARIOUS FEDERAL AND PROVINCIAL CORPORATE STATUTES THAT CAN AFFECT THE CHOICE OF JURISDICTION OF INCORPORATION, DEPENDING UPON THE PARTICULAR CIRCUMSTANCES.

A foreign investor will find the following features of Canadian corporate legislation of interest:

— Under the CBCA, 25% of a Canadian corporation's directors must be "resident Canadians" (i.e., individuals resident in Canada who are either Canadian citizens or Canadian permanent residents). Corporations established under the laws of most provinces and territories have no residency requirements for their directors at all, with only a few provinces imposing similar requirements to the CBCA.

— The board of directors of a private Canadian corporation must consist of at least one director but can have an unlimited number of directors.

— Each director must be an individual person, and a director may not, in most cases, appoint an alternate to serve in his or her place.

— Directors are generally subject to a number of liabilities and obligations under corporate law, as well as under a range of other federal and provincial laws, including those relating to the environment, tax, securities, pensions and employment.

— The shareholders of a Canadian corporation can, in most cases, enter into a "unanimous shareholders' agreement" to restrict the powers of the board of directors. To the extent the powers of the directors are so restricted, the liabilities and obligations of the directors will generally be transferred to the shareholders.

— Single shareholder corporations are permitted, and directors need not hold shares in the corporation.

— Minority shareholders of a Canadian corporation have significant statutory rights and remedies and eliminating minority shareholders can often be difficult and costly.

— The board of a Canadian corporation must approve the corporation's financial statements annually and present them to the corporation's shareholders.

— Generally, there is no requirement to file a Canadian corporation's financial statements with a government body, except in the case of a public company.

— The requirement that the corporation's financial statements be audited varies by jurisdiction; in most cases, it is possible for the corporation's shareholders to consent to exempt it from the audit requirement, except in the case of a public company.

— The identities of a Canadian corporation's shareholders are generally not a matter of public record. However, private corporations governed by the CBCA and the applicable corporate legislation in British Columbia are required to maintain a register of individuals who, directly or indirectly, have significant control over the corporation. Access to such registers is restricted to certain persons and authorities upon request, and the information may only be used for specific purposes. Several other provincial and territorial governments have agreed to introduce similar record-keeping requirements to the CBCA.

— Meetings of the board of directors and, in certain circumstances, the meetings of the shareholders of a Canadian corporation need not take place in Canada.

— Resolutions of directors or shareholders may be passed by a written instrument signed by all of the directors or shareholders, as the case may be, in lieu of a meeting.

— The statutory books and records of a Canadian corporation, including those maintained in electronic form, must be kept in the province or territory in which the corporation is incorporated, or registered in the case of a CBCA corporation.

United States businesses coming to Canada may, in certain circumstances, use unlimited liability companies (ULCs) as a vehicle for

their business activity in Canada because of the favourable treatment that we understand may be afforded to ULCs as potential “flow-through” entities under U.S. tax law. U.S. tax advice should be obtained.

In addition, certain anti-hybrid provisions in the *Canada-United States Income Tax Convention* (1980) (U.S. Convention) should be considered, as in certain circumstances they may eliminate the tax benefits associated with such entities or give rise to adverse tax consequences without proper tax planning. See **Taxation**.

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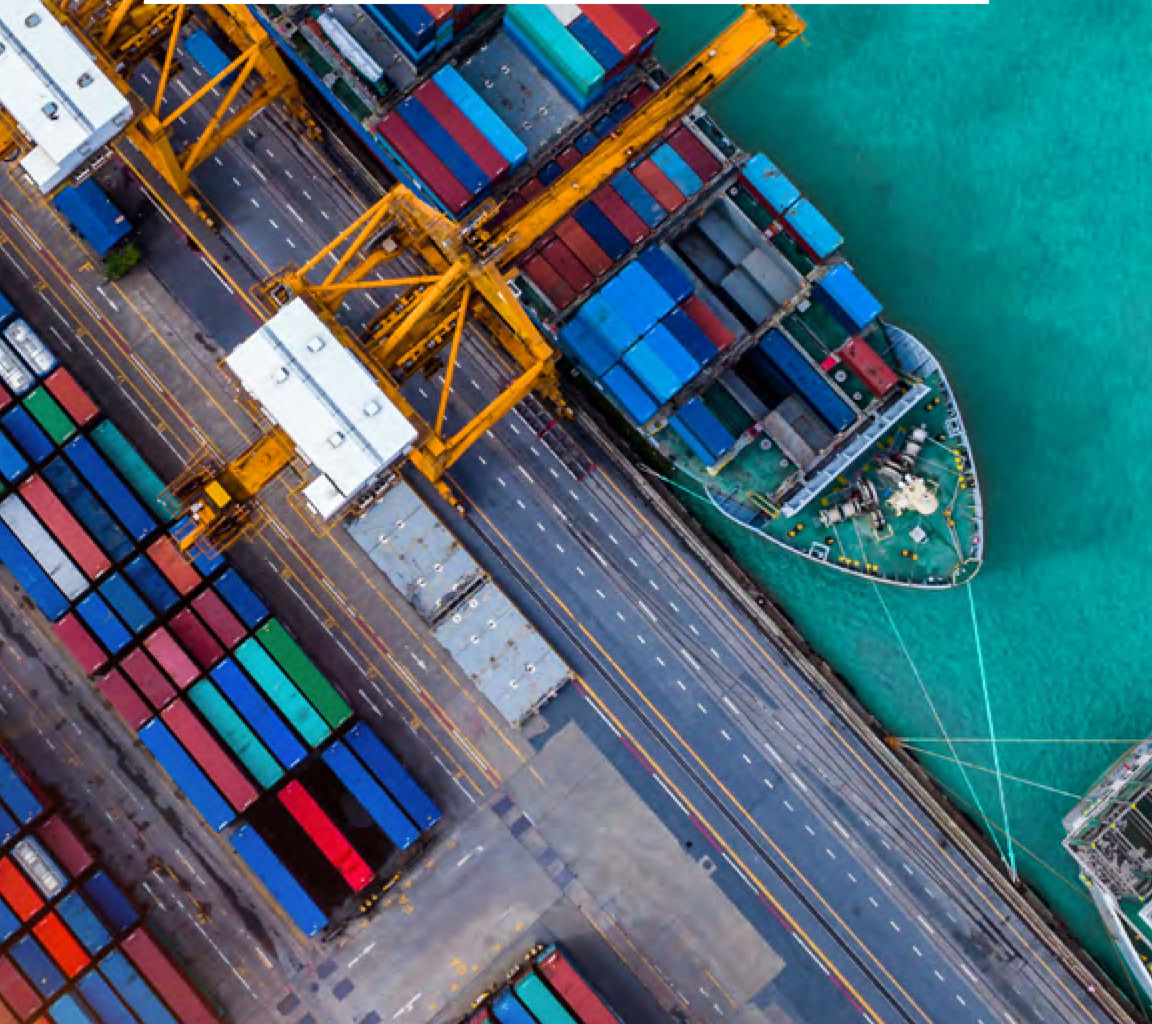
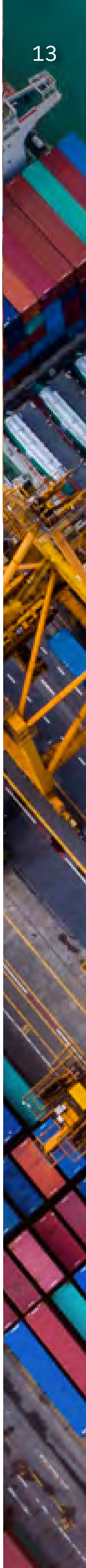
FOREIGN INVESTMENT LAW & NATIONAL SECURITY

By Mike Caldecott and Will Rooney





FOREIGN INVESTMENT LAW & NATIONAL SECURITY

General Overview

Canada's foreign investment review regime is set out in the *Investment Canada Act* (ICA). There are two separate processes contemplated by the ICA: (i) economic and/or cultural review of specified investments ("net benefit regime"), which is a mandatory and suspensory review process required for investments that exceed certain prescribed financial thresholds. Where the thresholds are not exceeded, an investment may still be subject to a technical notification requirement under the net benefit regime, and (ii) national security review.

THERE ARE TWO DIFFERENT ENFORCEMENT REGIMES CONTEMPLATED BY THE ICA: (I) REVIEW OF SPECIFIED INVESTMENTS FOR THEIR NET BENEFIT TO CANADA, AND (II) NATIONAL SECURITY REVIEW.

The ICA net benefit regime applies whenever a non-Canadian investor: (i) acquires control of a Canadian business; or (ii) establishes a new Canadian business, whereas the ICA national security regime applies to any investment (including minority investments) into entities carrying on all or any part of its operations in Canada.

The ICA's suspensory net benefit provisions are triggered where certain investments by a non-Canadian in a Canadian business surpass specified thresholds. These thresholds vary depending on the identity of the investor and if the Canadian business is engaged in cultural activities as defined in the ICA (in the latter case, the applicable thresholds are significantly lower).

Where a qualifying investment is not subject to suspensory net benefit review, the investor will be required to submit a **technical notification**, which applies to all direct and indirect acquisitions of control of Canadian businesses (and the establishment of a new Canadian business). This process requires the filing of a relatively short information form either before or within 30 days after completion of the transaction.

The ICA's **national security** provisions have the broadest scope. The ICA provides the Canadian government with the power to review <u>any</u> equity or asset investment by a non-Canadian (including non-controlling interests) involving a Canadian entity on national security grounds.

Transactions can be approved (with or without conditions), blocked or unwound by the government. The ICA's national security provisions apply to acquisitions of entities that do not constitute "Canadian businesses" and most corporate reorganizations (even where there is no change in ultimate control).

Importantly, investments by investors whom the Canadian government considers foreign State-Owned Enterprises (SOEs) — and those into entities active in Canada that operate in certain, more sensitive sectors — receive special attention under the ICA and related policy documents.

Legislative amendments with respect to the ICA's national security regime have been introduced to the federal Parliament that would change many aspects of the current regime. These possible amendments, which are not anticipated to be enacted before Q1 2024 at the earliest, are discussed further below.

Relevant Laws

The ICA is the only federal foreign investment law of general application in Canada. The ICA is supported by two relevant sets of regulations: the *Investment Canada Regulations* (SOR/85-611) and the *National Security Review of Investments Regulations* (SOR/2009-271).

In addition to the ICA's framework, certain statutory provisions restrict foreign investment and ownership in specific areas, including the financial services, air transportation, and broadcasting and telecommunications sectors. There are also foreign investment disincentives for media (including film) and publishing.

Separately, the *Competition Act* (Canada) also regulates investments with a nexus to Canada. Compliance with provisions of the ICA does not bar review or action by Canada's Competition Bureau under the merger provisions of the *Competition Act*. See **Competition Law**. Additionally, investments in transportation businesses that raise public interest issues that exceed the *Competition Act*'s pre-merger notification thresholds may also be subject to the *Canada Transportation Act*'s pre-closing review.

Confidentiality

Information submitted under the ICA is treated as confidential and, subject to narrow exceptions, will not be disclosed to the public. Such information is exempt from *Access to Information Act* requests.

Information provided by an investor can be shared with other investigating agencies within Canada. However, in general, information provided in the context of an investment review is protected from disclosure to other government agencies unless necessary for the purposes of the administration and enforcement of the ICA.

In the context of a national security review, the government may communicate with prescribed investigative bodies, who may themselves disclose the information to others for the purposes of that agency's investigation. The government also shares information with foreign agencies conducting parallel national security investigations. Typically such co-ordination can be expected with Canada's close allies (e.g., the "Five Eyes" countries).

Application of the ICA: Non-Canadians

The ICA applies only to investments proposed or implemented by non-Canadians. If the investor's ultimate controller is a Canadian, the ICA does not apply. A 'Canadian' is defined as: (i) a Canadian citizen or permanent resident; (ii) the Canadian government (including agencies and provincial or local governments); or (iii) a Canadian-controlled entity (based on the nationality of the person or persons that ultimately control the investor).

Net Benefit to Canada Review

Application: Acquisition of Control of a Canadian Business

As noted above, certain investments that meet prescribed thresholds are subject to mandatory and suspensory review under the net benefit regime. The net benefit regime captures acquisitions of control of a Canadian business.

THE "NET BENEFIT" REVIEW THRESHOLD CHANGES IF THE INVESTOR IS A STATE-OWNED ENTERPRISE.

An **acquisition** can occur in one of three forms, in each case by a non-Canadian: (a) the acquisition of voting shares of a corporation incorporated in Canada; (b) the acquisition of voting interests of a non-share capital corporation, partnership, trust or joint venture carrying on that business, or (c) the acquisition of substantially all of the assets used to carry on that business).

A **Canadian business** is defined as a business carried on in Canada that (a) has a place of business in Canada; (b) employs persons in Canada in connection with the business; and (c) uses assets in Canada to carry on the business.

Non-Cultural Review

Direct acquisitions of control of a Canadian business that is not a cultural business (as defined in the next subsection) are subject to a review as to whether the transaction is of net benefit to Canada, if certain financial thresholds are met. For such transactions, review and approval of the investment by the Minister of Innovation, Science and Industry must occur before the transaction can close. Indirect acquisitions of a non-cultural Canadian business, on the other hand, are subject only to a technical notification, which can be made before or within 30 days after closing.

The threshold to trigger review for an acquisition of a non-cultural Canadian business depends on the identity of the investor. The threshold for a "trade agreement investor" (a person or entity from countries with which Canada has specified trade agreements) is higher than that for a "WTO Investor" (a person or entity from countries, other than Canada, that are members of the World Trade Organization). The thresholds, calculated using book values based on the most recent audited financial statements, are:

— C$1.931 billion (2023) in enterprise value of the target where the acquiror, or the target is a non-SOE "trade agreement investor," (e.g. from the United States or the European Union) or

— C$1.287 billion (2023) in enterprise value of the target where the non-SOE acquiror or target are controlled in other WTO member states (such as investors controlled in China).

The net benefit review threshold changes if the investor is a SOE. Investments by entities ultimately controlled by an SOE are subject to review where the book value of the assets of the Canadian business is C$512million (2023) or more.

The definition of a SOE under the ICA is broad. A SOE is defined to include an entity controlled or influenced, directly or indirectly, by a government or agency of a foreign state. In addition to this flexible definition, the Minister of Innovation, Science and Industry has the power to retroactively determine that an entity is controlled in fact by a SOE, as well as to determine retroactively whether there has been an acquisition of control in fact by a SOE.

Cultural Review

The ICA provides a parallel net benefit review regime to investments involving businesses with a nexus to Canadian "cultural heritage and national identity." This includes book publishing, magazine and newspaper publishing, film production and distribution, music production and distribution, television, and radio. The Canadian government has interpreted this term broadly, including other activities that are not listed but analogous, such as video games, the exhibition of video content on online media and other digital activities.

Unlike non-cultural net benefit review, the review of a cultural business has both a broader scope and lower thresholds. Where a non-Canadian seeks to acquire control of a Canadian cultural business, directly or indirectly, review and approval by the Minister of Canadian Heritage is required provided the following thresholds (calculated using book values based on the most recent audited financial statements) are met:

— Where there is a direct acquisition of control of a Canadian cultural business (i.e., the target transacting entity is Canadian-domiciled), the book value of the assets of the Canadian business is C$5 million or more.

— Where there is an indirect acquisition of control of a Canadian business if either: (i) the Canadian business has assets of C$50 million or more in value; or (ii) the Canadian business represents more than 50% of the assets of the acquired group of entities and the Canadian business has assets of C$5 million or more in value.

Direct acquisitions of a cultural business that exceed the applicable threshold must be reviewed and approved prior to closing. For indirect acquisitions, the transaction can be reviewed and approved on a post-closing basis.

Note, even if an acquisition or establishment of a cultural business does not trigger the review threshold, Federal Cabinet may, nonetheless, order a review if it considers it to be in the public interest.

Procedure and Substantive Review

Where an investment is subject to net benefit review, the investor must submit an application for review to the relevant Minister (for cultural business, the Minister of Canadian Heritage, and for non-cultural businesses, the Minister of Innovation, Science and Industry). The application contains two basic elements:

— Basic information set out in the application form (i.e., background on the investor, its ultimate controller and the Canadian business being acquired); and

— a detailed business plan for the Canadian business post-merger that covers topics relevant to Canada's economic interest, including: employment, Canadian representation in management, the business' presence in Canada, continued investment in the Canadian business, and R&D.

Typically, the business plan will make reference to the historical performance of the Canadian business as a reference point for the relevant Minister to assess the investor's proposal.

Clearance under the net benefit review regime requires the relevant Minister to be satisfied, or deemed to be satisfied, that the investment "is likely to be of net benefit to Canada."

In determining "net benefit to Canada," the relevant Minister must consider:

— the effect of the investment on the level and nature of economic activity in Canada;

— the degree and significance of participation by Canadians in the Canadian business and the industry of which it forms a part;

— the effect of the investment on productivity, industrial efficiency, technological development and product innovation and variety in Canada;

— the effect of the investment on competition within an industry in Canada;

— the compatibility of the investment with national industrial, economic and cultural policies; and

— the contribution of the investment to Canada's ability to compete in world markets.

In the context of cultural investment review, the relevant Minister must take into account the goal of the Department of Canadian Heritage to promote Canadian content across various forms of media.

Where a net benefit review is triggered, the relevant Minister has until 45 days after the complete application is received to determine whether the investment is likely to be of net benefit to Canada. The relevant Minister may, and typically does, unilaterally extend their review by 30 calendar days. Further extensions can, and very often do, occur with the consent of the investor.

For this reason, timelines for net benefit reviews can be protracted. In 2021-2022 (the most recent year for which data was available), eight non-cultural businesses were subject to review. The average assessment time was 88 days. In 2019-2020 (the most recent year for which data is available), five cultural investments were subject to automatic review by the Department of Canadian Heritage. The average assessment time for applications for review was 143 days.

If the relevant Minister initially decides that the investment will not be of net benefit to Canada, the non-Canadian will be given an opportunity to make representations and submit undertakings with respect to the investment with a view to satisfying these requirements. In most net benefit reviews, the investor will be required to provide binding undertakings to the relevant Minister, typically relating to domestic economic factors like employment in Canada, capex spending in Canada, maintaining Canadians in leadership positions and retaining Canadian IP rights.

THE CANADIAN GOVERNMENT HAS ALSO ISSUED GUIDELINES FOR THE REVIEW OF INVESTMENTS BY FOREIGN STATE-OWNED ENTERPRISES.

SOE Investments

The Canadian government has promulgated a number of policy statements that specifically apply to SOEs. Some are sector specific. Government policy statements explain that investments by SOEs in the oil sands or in critical minerals will only rarely be found to be of net benefit to Canada. Other guidance relates to the identity of the investor. Specifically, the *Policy Statement on Foreign Investment Review and the Ukraine Crisis* states that investments by Russian SOEs will be found to be of net benefit to Canada on an "exceptional basis only."

Apart from this specific guidance, Canadian government has also issued general guidelines for the review of investments by SOEs. The guidelines articulate specific factors that the relevant Minister will examine as part of his or her assessment of the net benefit factors listed above. The guidelines reflect the potential concerns the relevant Minister may have regarding the "governance and commercial orientation of the SOE." The relevant Minister will examine:

— The corporate governance and reporting structure of the SOE, including whether it adheres to Canadian standards of corporate governance. This includes commitments to transparency and disclosure, independent members of the board of directors, an independent audit committee, equitable treatment of shareholders and adherence to Canadian laws and practices.

— Whether the Canadian business to be acquired by the SOE will continue to have the ability to operate on a commercial basis and specify a number of important indications. These include where exports go, where processing takes place, the participation of Canadians in the operations and the level of capital expenditures to maintain the Canadian business.

A SOE can therefore anticipate that it may be required to provide undertakings beyond those normally expected of a non-SOE in order to secure approval by the relevant Minister. Indeed, the Canadian government will expect that a SOE investor address its inherent characteristics (specifically that it is susceptible to state influence) in its plans for the Canadian business to be acquired and related undertakings.

National Security Review

The Canadian government has the authority to review all proposed investments (regardless of size and whether control was acquired) that involve a non-Canadian where the responsible Minister has "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security."

For notifiable investments, the Canadian government has jurisdiction to initiate review the proposed transaction from any time that it becomes aware of the investment up until 45 days after receipt of a complete notification by the investor. For investments that are not subject to mandatory notification, the Canadian government's jurisdiction to review an investment on national security grounds expires five years after the implementation of the investment (unless the investment is voluntarily notified by the investor, which shortens this timeline to 45 days).

A national security review can occur — on the government's initiative — before or after closing. Where a review is commenced prior to closing, there is suspensory effect (i.e., the investor cannot close the transaction until the national security review is complete). A national security review proceeds in several phases and may take up to 200 days (or longer, subject to any agreed-on extensions). In broad strokes, the review proceeds as follows:

— **Notice of Review.** The responsible Minister can issue a notice to the investor that a national security order may be made to obtain an addition 45 days to decide whether to launch a national security review.

— **Formal National Security Review.** If the responsible Minister has reasonable grounds to believe that the investment could be injurious to national security, the responsible Minister may refer the matter to Federal Cabinet for an order initiating a formal national security review, extending the review by another 45 days. This review period may be extended without the investor's consent by a further 45 days. Subsequent extensions of 45 days require the investor's consent (which in practice is not usually withheld).

— **Ultimate Determination from Federal Cabinet.** At the end of the review period, the responsible Minister can refer the matter to Federal Cabinet along with a recommendation. Federal Cabinet has 20 days to decide whether to approve the investment (with or without conditions) or prohibit the transaction (if pre-closing), or require the investor to divest itself of the Canadian business (if post-closing).

When to Notify: Mandatory Filings

As noted above, the Canadian government's jurisdiction to review an investment on national security grounds expires either: (i) five years after the implementation of the investment (where the investment is not notifiable); or (ii) 45 days after the responsible Minister becomes aware of the transaction or is deemed to become aware of the transaction by virtue of receipt of a complete "notification."

As a notification can be submitted either before or after closing, the choice of when to file is a key strategic decision. The commencement of the national security review process is suspensory; an investor cannot close a transaction if there is a review ongoing. Typically, where there is national security risk, filing prior to closing is more buyer-friendly, since it will crystallize the possibility of intervention prior to the buyer taking ownership of the target. By contrast, sellers generally prefer to file a notification after closing, to avoid having to participate in any ensuing national security review.

That said, the Canadian government does not currently have the ability to impose interim conditions on the investor (i.e. limiting the ability of the investor to integrate and run the target business as it wishes pending the outcome of the review). Therefore, after closing, the purchaser will have full enjoyment of the business until a final determination is made with respect to the national security review. For this reason, where there is little or no national security risk, it is often preferable to the buyer to notify after closing.

Whether to Notify: Voluntary Filings

There are numerous investments that do not require review or notification under the net benefit regime but which are subject to the jurisdiction of the national security regime. For that category of investments, the investor must choose whether to pursue "voluntary notification."

Voluntary notification provides investors with the ability to avoid timing uncertainty. Without notification, the responsible Minister will have five years post-closing to challenge the investment. Submitting a voluntary notification limits the responsible Minister to 45 days to decide whether or not to begin a national security review. Provided this timeline is built into the relevant transaction documentation, the investor can crystallize any possible national security risk in Canada by filing on a voluntary basis with sufficient time to enable the 45-day intervention period to expire.

National Security: Substantive Assessment

There is no definition of what constitutes "injurious to national security" under the ICA. However, certain industries are likely to attract greater scrutiny. Businesses with exposure to technology, critical infrastructure, essential products and services, critical minerals, defence, and/or Canadians' sensitive personal data all raise greater risk of national security review. The Canadian government's *Guidelines on the National Security Review of Investments*, updated in 2021, includes a non-exhaustive list of activities that may relate to national security. Although these guidelines provide some insight as to when a national security review may occur, there are notable gaps and foreign investors often receive limited transparency during the national security review process. If the Canadian government believes that a transaction may be injurious to national security, the transaction can be blocked, subjected to conditions, or, if already implemented, subjected to remedies, which can include divestiture.

Government data published in 2022 covering reviews in 2021-2022 year showed the highest ever number of national security reviews. While the responsible Minister issued the same number of national security "notices" (used by the government to extend the time available to consider whether a full national security review is warranted) as in the previous year (24 in total), they issued the highest number of national security review orders yet (12). Put differently, 50% of notices resulted in an extended national security review (which can last for 200 days or more). Of these 12 extended reviews, four investors originated from Russia, and six from China. Despite the presence of investors from higher-risk jurisdictions in these cases, the final outcomes of the 12 extended national security reviews were more permissive than in prior years. Seven of the 12 were cleared unconditionally; and only four were abandoned (likely pre-empting a prohibition or divestiture order).

Special Considerations for SOEs

Consistent with the guidance on SOEs that applies to the net benefit regime, guidance on national security specifically addresses SOEs. In general, investments by SOEs are subjected to enhanced scrutiny under the national security regime, particularly in respect of investors from non-allied jurisdictions.

Moreover, parallel subject-matter-specific and investor-specific considerations also apply to SOEs under the national security regime, similar to those that apply under the net benefit regime. Investments by SOEs in critical minerals are more likely to be subjected to "heightened" national security scrutiny, as will investments by Russian SOEs.

Anticipated Amendments to National Security Review

On December 7, 2022, a series of proposed amendments were introduced by the federal government for debate by Canada's House of Commons.

The amendments, if passed, will make a series of significant changes to Canada’s national security regime. There is currently no specific timeline for their coming into force, but at the time of publication, they are not anticipated to be enacted until the first half of 2024. Specifically, they will add:

— **Interim Conditions.** The ability for the responsible Minister to impose conditions on the investor pending the completion of the national security review process.

— **Mandatory Pre-Implementation Notification for Specified Investments.** For investments in prescribed industries (a term yet to be defined, but likely to include more sensitive business sectors) where the investment could result in the investor obtaining access to specified information and where the acquisition entitles the purchaser to certain rights, mandatory notification prior to implementation would be required.

— **Conditional Approval by the Minister.** Under the present national security regime, binding undertakings can only be imposed on the investor via an order from federal Cabinet. The new amendments would allow the Minister to conditionally approve investments, subject to binding undertakings. This would remove the need for the Minister to seek Cabinet input in respect of a final national security decision in cases where they consider mitigation to be appropriate to resolve the identified concerns.

Investors are advised to seek counsel’s advice to ensure they remain abreast of the latest developments in Canada’s national security regime.

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COMPETITION LAW

By Kate McNeece and Alykhan Rahim

COMPETITION LAW

The federal *Competition Act* (Act) provides for criminal sanctions against persons involved in agreements with competitors that fix prices, restrict supply or allocate customers or markets, or that are involved in bid-rigging, deceptive telemarketing, or wilful or reckless misleading advertising offences. A civil regime regulates the less egregious forms of misleading advertising. The Act also contains non-criminal provisions that allow the Competition Tribunal, on application by the Commissioner of Competition, to review certain business practices, and, in certain circumstances, to issue orders prohibiting or correcting conduct to eliminate or reduce its anticompetitive impact. Reviewable practices include mergers, agreements among competitors, abuse of dominant position, and a number of vertical practices between suppliers and customers, such as price maintenance, tied selling, refusal to supply and exclusivity arrangements. Private parties are also able to apply to the Competition Tribunal to challenge certain types of reviewable conduct, such as abuse of dominant position, price maintenance, exclusive dealing, tied selling and refusal to deal. The Competition Tribunal also has the power to impose monetary penalties for abuse of dominant position and misleading advertising.

Merger Regulation

The Commissioner of Competition can review and challenge all mergers (meaning the acquisition of control over a significant interest in the whole or a part of a business), whether or not they are subject to pre-merger notification requirements under the Act (as described below), within one year of closing. If the Commissioner believes that a merger is likely to prevent or lessen competition substantially, and the Commissioner of Competition challenges the merger before the Competition Tribunal, the merger is then subject to review by the Competition Tribunal. If an adverse finding is made, the Competition Tribunal may issue an order preventing or dissolving the merger in whole or in part. The Act includes a list of criteria to be considered by the Competition Tribunal when determining whether a merger substantially lessens competition. Such criteria are generally similar to those found in U.S. case law, although their application may be different. The Act also provides a uniquely

THE COMMISSIONER OF COMPETITION CAN REVIEW AND CHALLENGE ALL MERGERS, WHETHER OR NOT THEY ARE NOTIFIABLE, WITHIN ONE YEAR OF CLOSING.

Canadian "efficiencies defence" to anticompetitive mergers, which applies in cases where the efficiencies from the merger (that are realizable in Canada and calculated according to case law) are likely to be greater than and offset the transaction's anticompetitive effects.

Certain types of transactions that exceed prescribed thresholds require pre-merger notification and the filing of information with the Commissioner. Generally, pre-notification of such transactions is required if both (i) the parties to the transaction (together with their affiliates) have combined aggregate assets in Canada, or combined gross revenues from sales in, from and into Canada, exceeding C$400 million and (ii) the aggregate assets in Canada of the target (or of the assets in Canada that are the subject of the transaction) or the annual gross revenues from sales in or from Canada generated by those assets, exceeds C$93 million (2023; this threshold is adjusted annually). Equity investments are also notifiable if the financial thresholds are met and the applicable equity thresholds are exceeded (more than 20% in the public company context, more than 35% in the private or non-corporate entity context or an acquisition of more than 50% of a public company voting shares or private entity equity if a minority interest is already owned by purchaser).

In general, and with certain exceptions, these asset and revenue values are calculated using book values based on the most recent audited financial statements for the relevant entity. Pre-merger notification involves the filing of a notification form with the Commissioner of Competition. A transaction that is subject to pre-merger notification may not be completed until such notice has been given to the Competition Bureau and the statutory waiting period has expired or, alternatively, has been terminated early or waived by the Bureau. The parties' notification filings are customarily accompanied by a substantive white paper, known as the request for an Advance Ruling Certificate (ARC).

The filing of both parties' complete notification forms triggers an initial 30-day suspensory waiting period. If, within this initial period, the Commissioner of Competition issues a supplementary information request (SIR), which is an extensive request for documents and data similar to a Second Request under the U.S. *Hart-Scott-Rodino Act*, the waiting period is extended to 30 days after a complete response to the SIR by both parties has been provided to the Commissioner of Competition. Unlike the *Investment Canada Act* where the relevant minister approves the proposed transaction, the passing of the applicable waiting period under the Act does not preclude the Competition Bureau from subsequently opposing the merger at any time within one year after the merger has been completed. Accordingly, while a transaction may legally be completed after the expiry of the relevant waiting period, the parties will generally wait until they receive an indication from the Commissioner of Competition that the transaction will not be challenged before they complete the transaction. The Commissioner of Competition's review of complex mergers often takes longer than the applicable statutory waiting period.

> IT IS POSSIBLE IN SOME CIRCUMSTANCES TO OBTAIN AN ADVANCE RULING CERTIFICATE FROM THE COMMISSIONER OF COMPETITION AND THEREBY AVOID THE FORMAL MERGER NOTIFICATION PROCESS.

It is possible in some circumstances to obtain an ARC from the Commissioner of Competition and thereby avoid the formal merger notification process. If an ARC is issued in respect of a proposed transaction, the Commissioner of Competition will thereafter be precluded from challenging the transaction, assuming there are no material changes in circumstances prior to closing. It should be noted, however, that the granting of an ARC is discretionary, and that ARCs are typically issued only when it is clear the merger raises no competition issues. The Commissioner of Competition can also, in lieu of issuing an ARC, exempt the transaction from notification and issue a "no-action letter" indicating that the Commissioner of Competition does not have grounds to challenge the transaction, which is usually sufficient comfort for the merging parties to proceed.

A C$82,719.12 (2023) filing fee applies to companies filing a pre-merger notification and/or requesting an ARC. The filing fee is subject to an annual consumer price index adjustment.

Abuse of Dominant Position

Abusing a dominant position in a market constitutes a reviewable practice that could give rise to an order by the Competition Tribunal if it results in a substantial lessening of competition. The order can include monetary penalties up to three times the value of the benefit derived from the anticompetitive conduct (or, where such value cannot be reasonably determined, 3% of annual worldwide gross revenues).

To start with, there must be a dominant position or control of a market. A monopoly is not a prerequisite, but there must be a relatively high market share, such that the dominant firm or firms can, to a substantial degree, dictate market conditions and exclude competitors.

There must also be an abuse of such dominant position by the practice of anticompetitive acts, which includes any act that is intended to have a predatory, exclusionary or disciplinary negative impact on a competitor or to have an adverse effect on competition. There is nothing wrong with market dominance in and of itself; what causes a problem is the adoption by a dominant player of predatory, exclusionary or disciplinary business tactics. When a dominant firm attempts to exclude potential competitors or to eliminate existing competition, the Competition Tribunal can be called upon to intervene. It is not always easy to distinguish competitive from anticompetitive practices. There is nothing wrong with tough competition, even from a dominant firm. However, when a firm's intention is to eliminate competition or prevent entry into or expansion in a market, there could be an abuse of dominant position. The Act includes a non-exhaustive list of anticompetitive acts. These include selling at prices lower than acquisition costs in order to discipline or eliminate a competitor, inducing a supplier to refrain from selling to competitors, a vertically integrated supplier charging more advantageous prices to its own retailing divisions, or a dominant player targeting a new entrant or growing competitor. Predatory pricing is also a practice that could constitute an anticompetitive act.

The Act also allows private parties to bring an application to the Competition Tribunal if they are directly and substantially affected by the anticompetitive acts of another party. Applicants seeking private access must obtain leave from the Competition Tribunal and are not entitled to damages (i.e., the Competition Tribunal can only impose an administrative monetary penalty or make an order prohibiting the anticompetitive conduct).

Criminal Violations

It is a crime under the Act (subject to available defences) to enter into an agreement or arrangement with a competitor to fix prices for the supply of a product, allocate customers or markets for the production or supply of a product, or restrict the production or supply of a product. It is also a crime to engage in bid-rigging. These practices are prohibited regardless of their effect on competition.

Agreements between unaffiliated employers to fix or control wages or other terms and conditions of employment (wage-fixing) or to agree not to solicit or hire each other's employees (no-poach agreements) are also criminalized (as of June 2023). The prohibition does not require parties to the agreement to be competitors or for the agreement to have an anticompetitive effect. These agreements will not be pursued criminally where they are ancillary to an otherwise legitimate merger, collaboration, strategic alliance or joint venture; however, in those cases the Bureau can still review them under the Act's civil competitor collaboration provision.

Penalties for persons found guilty of the Act's criminal provisions include imprisonment for up to 14 years and/or fines set at the discretion of the court with no statutory maximum. A violation of the criminal provisions of the Act can also result in a civil suit for damages by the person or persons who have suffered a loss as a result of such violation.

Deceptive Marketing

It is against the law to advertise or market goods and services in a way that is false or misleading. The Act's deceptive marketing provisions apply to all forms of marketing to Canadian consumers regardless of the medium used. The Act contains criminal provisions for more egregious conduct, such as deceptive telemarketing, wilful or reckless misleading advertising, pyramid selling and multi-level marketing schemes. Some deceptive marketing practices, such as false or misleading representations or drip pricing, can be pursued under criminal or civil provisions, depending on the severity of conduct. Other deceptive marketing practices, such as warranty or guarantee claims and performance claims based on inadequate testing, and misleading pricing tactics, such as misleading ordinary price representations and bait and switch selling, are subject only to the Act's civil provisions.

Under the civil provisions, the Tribunal can order monetary penalties of up to three times the value of the benefit derived from the deceptive conduct (or, where such value cannot be reasonably determined, 3% of annual worldwide gross revenues). Penalties under the criminal provisions are the same as those noted above for other criminal violations.

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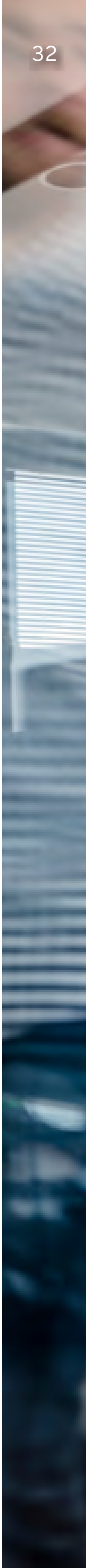
CORPORATE FINANCE, MERGERS & ACQUISITIONS AND PRIVATE EQUITY

By Jennifer F. Longhurst and Jeremy Pleasant



CORPORATE FINANCE, MERGERS & ACQUISITIONS AND PRIVATE EQUITY

Corporate Finance

Canada has well-developed and sophisticated capital markets. The main sources of capital are Canadian chartered banks, other financial institutions (including pension funds, mutual funds and insurance companies), public markets, private equity and government agencies. Securities of Canadian and foreign public companies can be listed and traded on one or more of Canada's stock exchanges. Canada's principal stock exchanges are the Toronto Stock Exchange (TSX), the country's largest stock exchange, and the TSX Venture Exchange (TSXV), each with their own listing requirements. Canada also has active over-the-counter markets for a variety of other securities, including, in particular, debt securities. Canadian chartered banks are the principal source of revolving lines of credit and term loans.

> SECURITIES LEGISLATION IN CANADA IS LARGELY HARMONIZED THROUGH THE USE OF NATIONAL AND MULTILATERAL INSTRUMENTS ADOPTED BY THE CANADIAN SECURITIES ADMINISTRATORS (CSA), AN UMBRELLA ORGANIZATION COMPRISING ALL OF THE PROVINCIAL SECURITIES REGULATORS, AND IMPLEMENTED AS LAW BY THE PROVINCES.

Public Offerings and Private Placements

In Canada, securities law is currently regulated under provincial jurisdiction and consequently each Canadian province and territory has its own separate securities regulator, as well as its own securities legislation. Nonetheless, securities legislation in Canada is largely harmonized through the use of national and multilateral instruments adopted by the Canadian Securities Administrators (CSA), an umbrella organization comprising all of the provincial securities regulators, and implemented as law by the provinces and territories. Further, the "principal regulator" or "passport" system adopted by each province of Canada (other than Ontario, which is Canada's largest capital market) allows many aspects of securities law to be effectively regulated by only one participating jurisdiction (i.e., the "principal regulator" in the circumstances), in addition to Ontario. These aspects include the review and receipt of prospectuses, compliance with continuous disclosure obligations and obtaining exemptions from various provisions of securities law.

When debt or equity securities are offered to the public in Canada, whether as part of an initial public offering (IPO), a secondary offering or otherwise, generally a prospectus must be filed with the securities regulatory authorities in those provinces and territories where the securities are being offered. The prospectus will be reviewed by the principal regulator under the passport system described above. A copy of the prospectus must also be provided to potential investors and publicly filed. The prospectus must contain full, true and plain disclosure of the nature of the securities being offered and the business of the issuer.

Where securities are being offered in Québec, an English language prospectus must also be translated into and distributed in French.

The requirement to prepare a prospectus can be avoided where securities are offered on basis that is exempt from the prospectus requirements exclusively to institutional or other "accredited investors" by way of a private placement, although in such cases market practice may nonetheless dictate the delivery to investors of an "offering memorandum" containing disclosure that is often substantially equivalent to a prospectus. There are a number of other prospectus exemptions, including for the issue of securities by "private issuers" or to employees, or the issue of short-term commercial paper with an approved rating and bank debt, in which case generally either no disclosure document or an abbreviated one is used. Securities sold on an exempt basis are typically subject to resale or seasoning restrictions.

Shareholders of Canadian public companies are not generally afforded statutory or contractual pre-emptive rights. Accordingly, new equity issues are typically effected by way of public offering or private placement, rather than by way of rights offerings to existing shareholders.

Issuers with equity securities listed on certain Canadian exchanges can take advantage of Canada's short-form prospectus distribution system, which enables capital to be raised in the public markets quickly by preparing and publicly filing a shorter prospectus that incorporates by reference the issuer's most recent financial statements and other continuous disclosure documents. Generally, issuers eligible for this system can clear a prospectus with the provincial securities authorities within four business days of filing a preliminary prospectus. In the case of more senior issuers, it is common for Canadian underwriting syndicates to enter into a "bought deal" arrangement. This constitutes an enforceable agreement by the underwriters to purchase the securities being offered for sale, even before the filing of a preliminary prospectus, with the result that the syndicate incurs the risk of price fluctuations in the market from the time of signing the "bought deal" letter with the issuer until the closing of the offering. In such cases, a preliminary prospectus must be filed within four business days of the signing of the "bought deal" letter, and the syndicate may begin to solicit purchasers immediately upon the signing of the letter and the issuance of a news release. For issuers that do not qualify under the short-form system, the process to clear a prospectus with the provincial securities authorities can often take from three to six weeks, and sometimes longer.

Canadian securities laws also provide issuers with the ability to file a base shelf prospectus for up to an aggregate dollar amount of securities (which may be unallocated between debt, equity and other securities) for subsequent issuance over a period of up to 25 months. At the time of an actual distribution of securities qualified by the base shelf prospectus — and not later than two business days after the determination of the offering price of the securities — the issuer simply files a relatively brief supplement to the prospectus containing the specific terms of the securities then being offered, as well as any additional information that was not available to the issuer at the time the prospectus was filed. Although there are exceptions (e.g., where innovative, structured or derivative products are being distributed), supplements to the base shelf prospectus are not reviewed by regulators, allowing issuers to act quickly and take advantage of narrow windows of opportunity for financing in the markets.

Continuous Disclosure Obligations

An issuer filing a prospectus, listing its securities on a Canadian stock exchange or acquiring a Canadian reporting issuer through a share exchange transaction, will become a "reporting issuer," and thereby become subject to various continuous and timely disclosure obligations under securities laws. These include the requirement to prepare and file quarterly and annual financial statements and the related management's discussion and analysis, as well as an annual information form and reports with respect to material changes in the affairs of the issuer. Directors, officers and other "insiders" (which include holders of more than 10% of the voting rights attached to the outstanding voting securities) of the issuer will be required to file insider reports with respect to any trading they conduct in securities of the issuer and will be precluded from trading in the issuer's securities if they possess any material non-public information about the issuer. Management information circulars must be prepared for annual and special shareholder meetings and must contain prescribed disclosure, including comprehensive disclosure on executive compensation in the case of annual general meetings or other meetings where directors will be elected or executive compensation will be voted on.

Foreign issuers that meet certain conditions and have become reporting issuers in Canada, whether by listing on a Canadian exchange or by acquiring a Canadian reporting issuer through a share exchange transaction, may generally satisfy their ongoing continuous disclosure obligations in Canada by filing their home jurisdiction documents.

The CSA has adopted various instruments modelled on U.S. Sarbanes-Oxley legislation. These include a national instrument on auditor oversight, a national instrument requiring CEO and CFO certifications and a national instrument on audit committees. In addition, a national instrument and a national policy have been adopted on corporate governance, which generally provide for a "comply-or-explain" regime. The latter sets out corporate governance best practices in the areas of board and committee independence, board process and policies, diversity and the board's oversight role; the former requires issuers to disclose, on an annual basis, their corporate governance practices.

Canadian and U.S. securities regulatory authorities have implemented a multi-jurisdictional disclosure system (MJDS) that enables securities of large U.S. issuers to be offered to the public in Canada using a U.S. registration statement that has been reviewed only by the U.S. Securities and Exchange Commission (SEC). Corporations with securities listed on a Canadian stock exchange are subject to the rules and regulations of that exchange.

Mergers & Acquisitions

Canada has established corporate and securities laws governing the acquisition of Canadian public companies, which can occur on a negotiated or unsolicited basis. There are two commonly used methods to acquire a public company in Canada: a take-over bid and a plan of arrangement, although in a hostile context typically a take-over bid would be the only practical structure available for an acquiror to effect an acquisition without the support of the target's board.

Take-Over Bids (Tender Offers)

Harmonized provincial and territorial securities laws regulate the conduct of public take-over bids. A public take-over bid is defined generally as an offer made to a person in a Canadian province or territory to acquire voting or equity securities of a class of securities of a target company which, if accepted, would result in the bidder (together with persons acting jointly and in concert with the bidder) owning 20% or more of the outstanding securities of that class of securities. A take-over bid must offer identical consideration to all shareholders, with no "collateral benefit" to any shareholder permitted. The bid must be open for acceptance for at least 105 days, subject to abridgement to not less than 35 days with the agreement of the target company in a friendly transaction or where another abridged bid or a going-private transaction has been announced. A take-over bid is subject to a mandatory tender condition that a minimum of more than 50% of all outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered and not withdrawn before the bidder can take up any securities under the take-over bid. The take-over bid must also be extended by the bidder for at least an additional 10 days after the bidder achieves the minimum tender condition and all other terms and conditions of the bid have been complied with or waived.

The bidder must provide shareholders of the target company with a take-over bid circular containing prescribed information about the offer, including prospectus level disclosure about the bidder (including pro forma financial statements) if the bidder's securities form part of the offered consideration. The directors of the target company must respond by sending a directors' circular to shareholders that includes the board's recommendation as to whether the shareholders should accept the offer or, if the board declines to make a recommendation, an explanation of why no recommendation has been made. Both the take-over bid circular and the directors' circular must be translated into French if the take-over bid is being made in Québec (unless a de minimis or other exemption from the translation requirement is obtained in Québec).

Certain take-over bids are exempt from compliance with the foregoing requirements. These include: transactions involving the acquisition of securities from not more than five shareholders of the target company, provided that the price paid does not exceed 115% of the prevailing market price; normal course purchases on an exchange that, when aggregated with other purchases made in a 12-month period, do not exceed 5% of the issuer's outstanding securities; the acquisition of securities for which there is no published market of a company that is not a reporting issuer and has fewer than 50 shareholders exclusive of current or former employees; and foreign take-over offers where, among other things, the number of shares held beneficially by Canadian shareholders is reasonably believed to be less than 10% of the total outstanding shares and Canadian shareholders are entitled to participate on terms at least as favourable as other shareholders.

In Canada, unlike in the United States, it is not permissible to make a take-over bid conditional on arranging financing. Before a bidder makes a cash take-over bid, it must have made "adequate arrangements" for its financing. Typically, the bidder will have signed a binding commitment letter with a bank or other source of funds prior to launching its take-over bid. The bidder will seek to have the conditions to the availability of the financing set out in the bank commitment letter as similar as possible to the conditions in the take-over bid circular that is sent to the target company's shareholders. The law requires that the bidder must be confident that if the conditions to the bid are satisfied, the financing will be available.

Generally, where a bidder successfully acquires 90% or more of the voting shares of a target company (other than shares held by the bidder or its affiliates prior to making the offer) pursuant to a public take-over bid made to all shareholders, the corporate statutes provide that shares held by those who did not tender to the offer can be acquired by the bidder at the same price as under the offer pursuant to a statutory compulsory acquisition procedure. Where this procedure is not available because the 90% threshold has not been reached, but at least 66 ⅔% of the outstanding shares have been acquired under the bid, the shares of the remaining shareholders who did not tender their shares to the offer may also generally be acquired by way of a second step squeeze-out merger/amalgamation at the same price as under the offer.

Plans of Arrangement

The federal and provincial corporate statutes in Canada generally provide that companies can be acquired or merged and their outstanding securities can be exchanged, amended or reorganized through a court-supervised process known as a plan of arrangement. Currently, acquisitions of Canadian public companies are most often completed by way of a plan of arrangement.

The target company will apply ex parte for an initial court order directing the target company to seek the approval of its shareholders and fixing certain procedural requirements for obtaining such approval. A management information circular will be prepared by the target company and mailed to its shareholders containing prescribed information, including prospectus level disclosure about the acquiror (including pro forma financial statements in certain circumstances) if the acquiror's securities form part of the offered consideration. Unlike with a take-over bid circular and directors' circular, this management information circular is not required to be translated into French, although a French language version is often provided where there are a significant number of shareholders in Québec. Plans of arrangement require both shareholder approval (generally by a special majority vote of not less than two-thirds of votes cast at the shareholder meeting) and final court approval (based on compliance with the initial court order and a determination by the court as to the substantive fairness of the arrangement). A plan of arrangement provides maximum flexibility to implement various structuring aspects of a transaction that might not be possible to implement under a take-over bid and can be accomplished in one step (instead of the two steps required by a take-over bid followed by a statutory compulsory acquisition or squeeze-out merger). A plan of arrangement will generally also enable the issuance of securities of the acquiror to U.S. holders of the target company without requiring such securities to be registered in the U.S.

If the acquiror is a TSX-listed company and is issuing shares under a take-over bid or plan of arrangement that would cause dilution to its shareholders of more than 25%, it will be required by the TSX to seek approval from its own shareholders prior to completing any such transaction.

Related-Party Transactions

The securities laws of certain Canadian provinces contain complex rules governing transactions between a public company and parties that are related to it (i.e., major shareholders, directors and officers) and that are of a certain threshold size — often referred to as "material conflict of interest transactions." These rules are designed to prevent related parties from receiving a benefit from a public company to the detriment of its minority shareholders without their approval and to level the playing field with respect to any informational advantage these related parties may have (or be perceived to have). Such transactions are generally subject to 'real-time review' by the applicable securities regulator and, where deficiencies in the process or disclosure associated with a transaction are identified, regulators have broad remedial powers, and can and will require enhanced disclosure and/or other changes to the transaction to assure the protection of minority securityholders.

A take-over bid made by a related party of the target company (i.e. an "insider bid") will engage these special rules, as will other transaction structures resulting in a "business combination" with a related party. In particular, such transactions typically require an enhanced review and approval process by the target's board, more robust disclosures pertaining to the background leading up to the transaction and, in many cases, may require that a formal valuation of the target company's shares be prepared by an independent valuator under the supervision of an independent committee of the target company's board.

If the acquiror in a plan of arrangement is related to the target company or if a related party is receiving a "collateral benefit," these rules will also generally apply. In particular, approval by a simple majority of the minority shareholders (i.e., shareholders unrelated to the acquiror or any related party who receives a collateral benefit) will generally be required in addition to the shareholder approval required by applicable corporate law. Where the related party is acquiring the target company or is a party to a concurrent "connected transaction" of a certain threshold size, then a formal valuation of the target company shares, prepared by an independent valuator under the supervision of the target company's board or an independent committee of directors, may be required.

In all cases, securities regulators in Canada have the power to intervene to halt a take-over bid or other transaction if it is abusive to the target's shareholders or the capital markets, even if it complies with applicable laws. They also have broad powers to intervene to prevent target boards from undertaking inappropriate 'defensive measures' aimed at thwarting a transaction.

Beneficial Ownership Reporting/Stakebuilding

Shareholders are generally required to publicly notify the market pursuant to "early warning reporting" requirements in the event they acquire beneficial ownership, direction and/or control over equity or voting securities representing 10% or more (5% where a take-over bid has already been made) of a class of securities of a target listed company (including shares beneficially owned or controlled by the shareholder and its joint actors). The investor must give this notice to the market by issuing a press release no later than the opening of trading on the next business day and filing, within two business days, an "early warning" report (EWR) in the prescribed form (which must include disclosure of the purpose for the transaction, including plans or future intentions the investor may have that relate to or would result in certain enumerated corporate actions with respect to the target company). There is also a cooling-off period that prohibits further purchases until the expiry of one business day after the report is filed, unless the acquiror already owns or controls more than 20% of the outstanding securities of that class. A further press release is required to be issued and an additional report filed if there is a change in a material fact contained in a prior report, upon an increase or decrease in ownership or control of over 2% or more of the class of securities or upon a decrease of ownership or control to less than 10% of the class of securities. There is an exception from the obligation to issue an immediate press release and EWR (and trading moratorium) for shareholders eligible to use the "alternative monthly reporting system;" in that case, an "eligible institutional investor" (i.e., typically financial institutions, mutual funds, pension funds, hedge funds and certain other investment funds) may report within 10 days of the end of the month in which it surpasses the 10% ownership threshold, provided it does not intend to make a take-over bid or other control transaction or to solicit proxies.

Shareholder Activism

Shareholder engagement and activism remains prevalent in Canada, although there is a continuing trend toward behind-the-scenes negotiation between shareholders and boards rather than formal proxy contests. Activism comes in various forms, including by investors submitting shareholder proposals and/or requisitioning a meeting of the target's shareholders, investor "say-on-pay" or "majority voting" votes on compensation and director elections, as well as private engagement with a target's boards and/or full-blown proxy solicitations or contests. It is often suggested that Canadian corporate and securities laws are more investor friendly than, say, in the United States, making activism potentially easier to pursue in Canada, although many of these tools are subject to established rules and guardrails preventing their misuse. Today's boards in Canada, like elsewhere, are becoming increasingly cognizant of shareholder activism and are becoming more receptive to engaging with critical stakeholders to proactively avoid a public contest. For instance, some boards have found it beneficial to consult with activists, while maintaining confidentiality, in board strategy discussions so they can voice their opinions or concerns rather than engaging in subsequent public challenges. Shareholder activism is also a frequent feature in all forms of M&A transactions, requiring both acquirors and targets alike to plan for potential activism in the context of any potential acquisition or disposition transaction.

Private Equity

Private equity funds are active participants in corporate finance and merger and acquisition transactions in Canada. Set forth below is a brief discussion on some legal topics that are particular to private equity funds.

A private equity fund that proposes to distribute its securities to persons located in Canada must either qualify the distribution pursuant to a prospectus prepared and filed in accordance with applicable Canadian securities regulatory requirements or it must conduct the distribution in reliance upon a prospectus exemption, such as the private-issuer exemption. The private-issuer exemption is available for a distribution of securities by a private issuer to a prescribed class of persons who purchase the securities as principal. By relying on this exemption, a private issuer can raise any amount of capital through any number of financings with no prospectus requirement.

When forming a private equity fund in Canada, consideration should be given to the application of dealer registration, adviser registration and investment fund manager registration requirements to the establishment and operation of the fund. A person is required to register as a dealer under Canadian securities laws if it engages in, or holds itself out as engaging in, the business of trading securities. A person is required to register as an adviser if it engages in, or holds itself out as engaging in, the business of advising others as to the investing in, or the buying or selling of, securities. A person is required to register as an investment fund manager if it acts as the manager of an investment fund. Depending on the activities to be undertaken by a private equity fund, it can be structured in a such a manner so that it is exempt from dealer registration, adviser registration and investment fund manager registration requirements.

WHEN FORMING A PRIVATE EQUITY FUND IN CANADA, CONSIDERATION SHOULD BE GIVEN TO THE APPLICATION OF DEALER REGISTRATION, ADVISER REGISTRATION AND INVESTMENT FUND MANAGER REGISTRATION REQUIREMENTS TO THE ESTABLISHMENT AND OPERATION OF THE FUND.

Private equity investments in Canada are similar to traditional mergers and acquisitions. When acquiring public companies, the legal analysis discussed above with respect to take-over bids and plans of arrangement is applicable. As most investments by private equity investors are leveraged with debt, special consideration should be paid to the financing of the acquisition (particularly reducing or removing financing conditions that are incremental to the conditions in the principal purchase agreement). See **Bank Loans and Other Loan Capital.**

Private equity funds may acquire majority or minority interests and therefore shareholder and/or investor rights agreements (or similar operating agreements, such as partnership agreements) become increasingly important for governance, control, capital contributions, distributions and liquidity rights or restrictions (such as tag-along rights, drag-along rights, rights of first refusal, rights of first offer and ownership restrictions). As noted above, public reporting of acquired majority or minority interests may also be triggered under applicable securities laws.

As private equity investments are made for a set time frame, tax structuring is very important to ensure an efficient structure is utilized, particularly for cross-border investments by U.S. private equity funds. Similar to the U.S., there are many exit strategies that can be utilized by private equity funds in Canada. Typical exit strategies exercised in Canada are a sale to: (i) the current management through a management buyout; (ii) other shareholders through share/unit transfer rights set out in the shareholder/partnership agreement; (iii) a third party through either a private sale or a controlled auction; or (iv) the public through an IPO.

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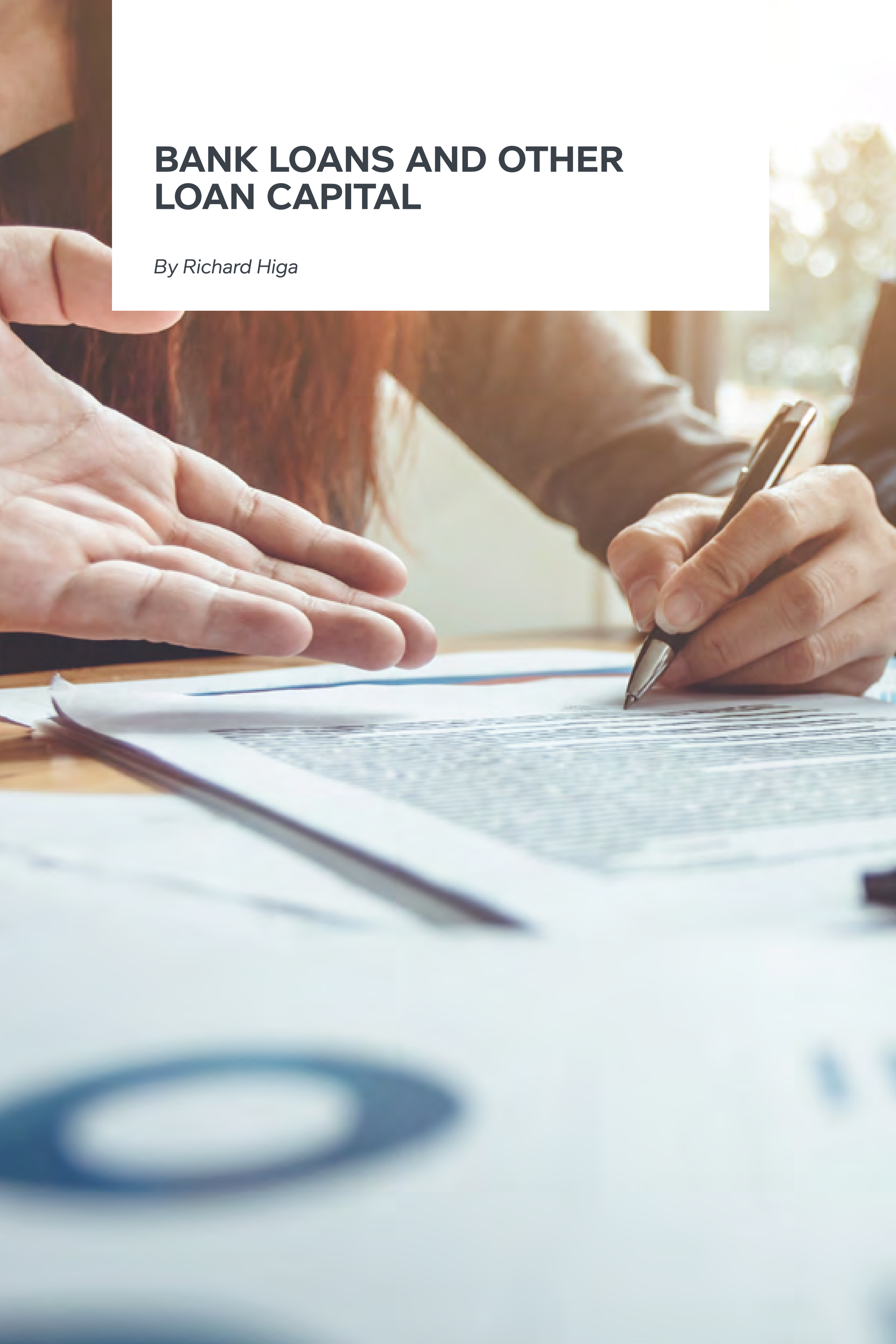
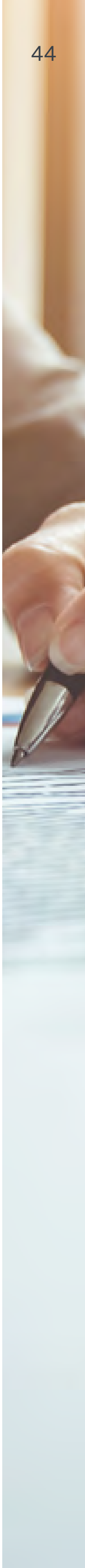


BANK LOANS AND OTHER LOAN CAPITAL

By Richard Higa



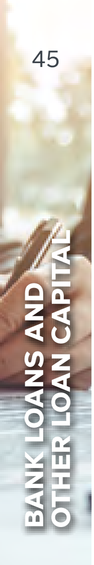
BANK LOANS AND OTHER LOAN CAPITAL

Bank loans in Canada are readily available from sophisticated domestic banks, as well as from non-Canadian foreign bank subsidiaries and Canadian branches of non-Canadian banks. The Canadian banking system is well regulated and Canadian banks are well capitalized. Canada also has competitive non-bank lenders that are particularly active in the asset-based loan, mezzanine debt and project finance markets. As well, there are two federal government financial institutions that provide financing — the Business Development Bank of Canada, which offers financing to small- and medium-sized businesses, and Export Development Canada, which is specifically targeted to assist Canadian exporters with financing.

Floating-rate loans are often indexed to a “prime rate” set by a Canadian bank on a periodic basis and based on the rate announced weekly by Canada’s central bank, the Bank of Canada. Fixed-rate loans are typically priced off long-term Government of Canada bond rates. Other forms of borrowing and interest rate pricing (such as SOFR, SONIA, ESTR and CORRA loans) are also offered, depending on availability and currency. Borrowers generally incur some fees associated with such transactions. These typically include legal costs, commitment and processing fees and other charges.

Short- and long-term loans in Canada can be unsecured or secured against the personal property and/or real property of the borrower. Lenders may insist that unsecured loans be supported by a parent company guarantee, or by a “negative pledge,” where the borrower agrees (with some exceptions) not to grant security over its assets. All provinces provide an electronic registry for the recording of security interests over personal property. All provinces also have established land registry systems to record interests in real property. See **Real Property**. As a general matter, the systems for registering security over personal and real property are similar to those in the United States.

Canada has no currency restrictions. Loans are available in multiple currencies but are most commonly denominated in Canadian and U.S. dollars. Due to the competitive nature of Canada’s loan markets, interest rates are often lower for comparable credits compared to other jurisdictions, particularly the U.S. Where Canadian tax rates are higher



than those of a foreign jurisdiction, the benefits of deducting interest expenses for loans in Canada are correspondingly higher. There are other tax advantages when borrowing in Canada. For example, thin-capitalization rules do not apply to arm's-length, third-party debt to limit the deductibility of interest. In addition, Canadian withholding tax will generally not apply to interest (other than certain types of interest) paid on arm's-length, third-party debt. Finally, Nova Scotia, Alberta and British Columbia have unlimited liability companies. These are hybrid entities that create tax-planning opportunities for U.S. cross-border transactions. See **Taxation**.

A number of federal and provincial programs and agencies provide grants and/or loans to Canadian businesses. The availability of government assistance will depend upon a number of factors. These include the location of the proposed investment, the number of jobs that will be created, the export potential for the product or service, whether the investment would be made without the government assistance and the amount of equity the owners of the business are investing. Foreign ownership of a corporation does not generally preclude the availability of government assistance programs.

A NUMBER OF FEDERAL AND PROVINCIAL PROGRAMS AND AGENCIES PROVIDE GRANTS AND/OR LOANS TO CANADIAN BUSINESSES.

All provinces and territories in Canada have *Securities Transfer Act* (STA) legislation. These acts govern, among other matters, the transfer of securities and other investment property and work with personal property security legislation to regulate the perfection of security interests in securities and other investment property, including securities in uncertificated form. The STA legislation was modelled after Revised Article 8 of the Uniform Commercial Code of the United States. This approach was taken so that there could be a more consistent regime governing the transfer of securities and other investment property cross-border between Canada and the U.S., as well as a uniformity of approach across Canada.

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TAXATION

By Stephanie Dewey and Jeremy Ho

TAXATION

Income Tax

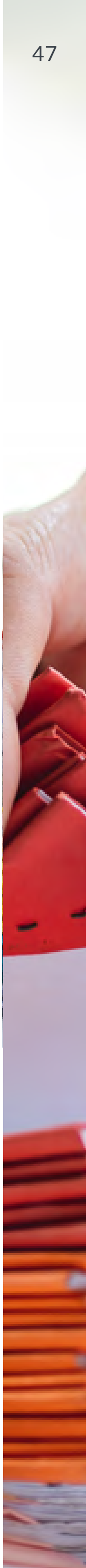
Income taxes are imposed at the federal level, as well as by the various provinces and territories. Federal income tax is levied on the worldwide income of every Canadian resident and, subject to the provisions of any applicable income tax convention, levied on the Canadian source income of every non-resident who is employed in Canada, who carries on business in Canada or who realizes a gain on the disposition of certain types of Canadian property (referred to as "taxable Canadian property"). Generally, a province or territory will also impose an income tax on persons resident, or carrying on business, in the provincial or territorial jurisdiction. Certain provinces and territories also tax non-residents on employment income earned in the province or territory. Additionally, the province of Québec taxes non-residents on gains realized on the disposition of certain types of property situated in Québec.

INCOME TAXES ARE IMPOSED AT THE FEDERAL LEVEL, AS WELL AS BY THE VARIOUS PROVINCES AND TERRITORIES.

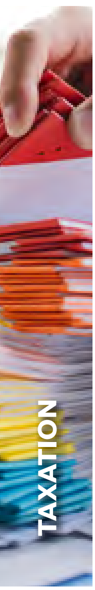
The combined federal and provincial/territorial rate of income tax imposed on corporations varies widely depending on the nature and size of the business activity carried on, the location of the activity and other factors. In 2023, the highest combined rate of income tax applicable to non-Canadian-controlled private corporations was approximately 31%, while the lowest rate applicable to the ordinary business profits of such a corporation was approximately 23%. Tax credits and other incentives are also available in certain circumstances to reduce the effective tax rates.

Individuals are subject to graduated rates. These rates depend on the type of income, the province/territory of residence and other factors. In 2023, the highest marginal combined federal and provincial/territorial rate of tax on taxable income of an individual was approximately 54.8%, while the lowest top marginal combined federal and provincial/territorial rate was approximately 44.5%.

Canada also levies a 25% withholding tax on the gross amount of certain types of Canadian source income of non-residents. Payments subject to withholding tax include dividends, certain types of interest, rents, royalties and certain management or administration fees. Withholding tax can also



apply to payments made between non-residents in certain circumstances, including if the payments relate to a Canadian business or to certain types of Canadian property. Generally, there is no Canadian withholding tax on interest paid by a Canadian resident to arm's-length non-residents of Canada (other than interest that is contingent or dependent on the use of or production from property in Canada, or interest that is computed by reference to revenue, profit, cash flow, commodity price or similar criterion, or by reference to dividends paid or payable by a corporation). An applicable income tax convention may reduce or eliminate the relevant rate of withholding tax. While withholding taxes are imposed on the non-resident recipient, the payer is responsible for withholding the tax from amounts paid to the non-resident and for remitting the withheld amount to the government.



The following sections highlight some of the principal tax matters that should be considered in deciding whether to carry on business in Canada through a Canadian subsidiary or as a branch operation.

Carrying on Business Through a Canadian Subsidiary

A corporation incorporated in Canada will generally be resident in Canada and subject to Canadian federal income tax on its worldwide income. As noted above, income of the subsidiary may also be subject to provincial and/or territorial income tax.

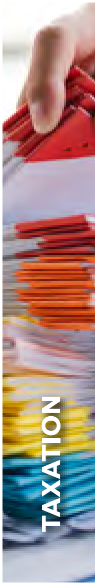
The combined federal and provincial/territorial income tax rate to which the subsidiary is subject will depend on the provinces and territories in which it conducts business, the nature of the business activity carried on and other factors.

A CORPORATION INCORPORATED IN CANADA WILL BE RESIDENT IN CANADA AND SUBJECT TO CANADIAN FEDERAL INCOME TAX ON ITS WORLDWIDE INCOME.

The calculation of the subsidiary's income will be subject to specific rules in the *Income Tax Act* (Canada) and any applicable provincial or territorial tax legislation. Income generally includes 50% of capital gains.

Expenses of carrying on business are deductible only to the extent they are reasonable. Depreciation of capital costs is deductible only in accordance with Canada's "capital cost allowance" rules. Neither federal nor provincial/territorial income tax is deductible in computing income subject to the other level of tax. Generally, dividends may be paid between related Canadian corporations on a tax-free basis. Groups of corporations may not file consolidated income tax returns. Accordingly, business losses of the subsidiary will not be directly available, for Canadian tax purposes, to offset income of an affiliated company. However, it may be possible to enter into intra-group income balancing transactions in certain situations.

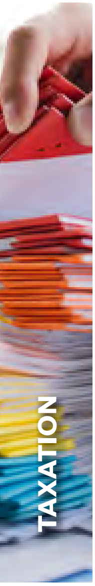
Transactions between the subsidiary and any person with whom it does not deal at arm's length, including its parent corporation, will generally need to be effected for tax purposes on a "fair-market-value" basis. Certain contemporaneous documentation may also be required under Canada's transfer pricing rules.



The debt/equity structure of the subsidiary will be subject to thin-capitalization rules, which operate to deny the deduction of interest payable to "specified non-residents" (generally, non-resident group members) by the subsidiary to the extent that the subsidiary is "thinly capitalized." The subsidiary is considered to be thinly capitalized where the amount of debt owed to specified non-residents is more than 1.5 times the aggregate of the retained earnings of the corporation, the corporation's contributed surplus that was contributed by specified non-residents and the paid-up capital of the shares owned by specified non-residents. Interest that is not deductible because of the thin-capitalization rules is deemed to have been paid as a dividend and is subject to withholding tax as such.

For tax years beginning on or after October 1, 2023 (subject to a transitional rule for tax years beginning before January 1, 2024), interest deductions will generally also be limited by Canada's proposed "excessive interest and financing expenses limitation" (EIFEL) rules. If applicable, these rules will generally limit the deduction of interest and financing expenses net of interest and financing revenues to 30% of tax EBITDA (i.e., earnings before interest, tax, depreciation and amortization, determined using tax concepts and subject to certain adjustments). Denied deductions may effectively be carried back three tax years or forward indefinitely, subject to certain limitations. Special rules may permit corporate groups to share excess capacity to deduct interest and financing expenses, or, where the group is heavily leveraged by third-party debt, to deduct a higher ratio of expenses.

In some cases, the subsidiary may be established as an unlimited liability company (ULC) under the laws of Alberta, British Columbia or Nova Scotia. This may be done to access certain advantages of both a branch and a subsidiary operation for a U.S. parent corporation. The reason is that while a ULC is treated as a corporation for Canadian tax purposes, we understand that it may be treated as a branch or a partnership for U.S. tax purposes. U.S. tax advice should be obtained on this point and certain provisions in the *Canada-United States Income Tax Convention* (1980) (U.S. Convention) should also be considered, as in certain cases they may eliminate the tax benefits associated with such hybrid entities or give rise to adverse tax consequences without proper tax planning.



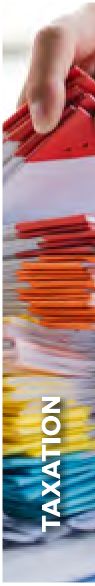
The withholding tax regime, briefly described above, will apply to the subsidiary's payments to non-residents, including interest and dividends. In the case of payments by a subsidiary to a U.S.-resident parent, the U.S. Convention eliminates the withholding tax on interest (other than certain types of interest, such as interest determined with reference to profits or cash flow or to a change in the value of property). The benefits of the U.S. Convention are, subject to some exceptions, available only to "qualifying persons," as defined in the "Limitation on Benefits" provisions of the U.S. Convention.

Canada is a signatory to the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI). The most significant treaty modification implemented through the MLI is the addition of a broad anti-avoidance rule into the applicable tax treaties, referred to as the principal-purpose test. Under the principal-purpose test, a treaty benefit may be denied where it is reasonable to conclude that one of the principal purposes of an arrangement or transaction was to gain such benefit, unless it is established that granting the benefit would be in accordance with the object and purposes of the relevant provisions of the treaty.

Carrying on Business in Canada Through a Branch Operation

Subject to the provisions of any applicable income tax convention, a non-resident corporation will be subject to Canadian income tax on business profits from carrying on business in Canada through a branch operation. A non-resident carrying on business in Canada must also pay a branch tax. The branch tax essentially takes the place of the withholding tax that would have been payable on dividends paid by a Canadian subsidiary carrying on the business. Because the withholding tax is imposed on dividends when they are paid and the branch tax is imposed when the profits are earned, it may be favourable in some circumstances to establish a subsidiary by the foreign business rather than a branch.

If the non-resident of Canada is: (i) a resident of a jurisdiction that has entered into an income tax convention with Canada; and (ii) entitled to the benefits of that convention, generally the non-resident will be taxable on its business profits earned in Canada only to the extent that such profits are attributable to a "permanent establishment" situated in Canada. Canada's income tax conventions may contain rules deeming a non-resident to have a permanent establishment in Canada in certain circumstances, such as where the non-resident has a dependent agent in Canada who has and habitually exercises the authority to conclude contracts in Canada. Under certain of Canada's income tax conventions, a non-resident may have a significant business presence in Canada without being deemed to have a permanent establishment in Canada. As noted above, in the case of the U.S. Convention, treaty benefits are generally available only to U.S. residents who are qualifying persons. A thorough review of the applicable convention is crucial in determining the relative merits of establishing a branch or a subsidiary business in Canada.



Generally, the income of the branch will be computed under the same rules that are applicable to the computation of the subsidiary's income, including the thin-capitalization and the EIFEL rules.

If the Canadian operation will incur startup losses, it may be possible for the non-resident to deduct these losses in computing its income for its domestic tax purposes if the Canadian business is carried on through a branch operation. Tax advice should be obtained in the non-resident's local jurisdiction. When the Canadian business becomes profitable at a future time, it may be possible to transfer the branch operation to a newly incorporated Canadian subsidiary with no significant adverse Canadian income tax consequences; however, the sales and other tax consequences of such a transfer should be carefully considered.

Foreign Currency Controls and Repatriation of Income

There are no foreign exchange or currency controls in Canada, nor are there exchange restrictions on borrowing from abroad, on the repatriation of capital or on the ability to remit dividends, profits, interest, royalties and similar payments from Canada.

As noted above, there may be a withholding tax payable on the repatriation of certain types of income, including interest, dividends and royalties.

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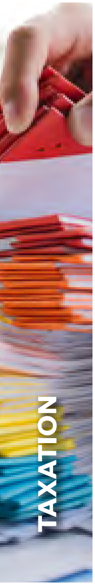

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SALES AND OTHER TAXES

By Simon Douville and Kassandra Grenier

SALES AND OTHER TAXES

The federal government and most of the provinces have sales tax regimes.

Federal Goods and Services Tax

The federal government imposes a 5% multi-stage, value-added tax called the Goods and Services Tax (GST), which applies to taxable supplies (e.g., supplies of most types of property, including intangibles and real property as well as services) made in Canada. Certain types of property and services, including most financial services, are exempt for GST purposes and certain supplies, defined as zero-rated supplies, which include exports, are taxed at a rate of 0%.

GST is also levied on taxable goods imported into Canada. Residents of Canada may also be required to self-assess GST on taxable supplies of services and intangibles acquired outside of Canada.

As a value-added tax, GST applies at each stage of the production and distribution chain. Generally, businesses making taxable supplies of property and services in Canada must register under the standard regime to collect and remit the applicable GST on their supplies made in Canada. While GST applies to every taxable transaction throughout the distribution chain, it is generally borne by the ultimate consumer. This is because businesses involved in commercial activities throughout the supply chain are normally entitled to recover by way of input tax credits the GST they pay on their inputs.

It is not always easy to determine whether supplies made to or by non-residents of Canada attract GST; accordingly, consideration of specific rules is required. For example, non-resident businesses making taxable supplies of property or services in Canada are generally only required to register for GST (and thus collect GST on their supplies) if they are "carrying on business Canada." Whether a non-resident is "carrying on business in Canada" generally requires a detailed analysis of their activities and presence in Canada.

Effective July 1, 2021, non-resident suppliers that do not carry on business in Canada must also consider whether they are required to register for GST under the new simplified registration regime. The simplified registration regime is part of the global trend to tax the digital economy. The new simplified registration regime was introduced to require certain non-resident suppliers and distribution platform operators that otherwise would not be required to register for GST under the standard regime to register for GST under the simplified regime if their annual sales to Canadian consumers exceeded, or it is reasonable to expect that they will exceed, C$30,000. In addition, effective January 1, 2021, new registration requirements under the standard GST regime were enacted for non-resident suppliers of tangible property that use fulfillment warehouses in Canada or otherwise deliver or made available tangible property in Canada to Canadian consumers.

Harmonized Sales Tax

Five provinces currently have harmonized their provincial sales taxes with the GST: Ontario, Nova Scotia, New Brunswick, Newfoundland and Labrador, and Prince Edward Island. In those provinces, the Harmonized Sales Tax (HST), made up of the federal 5% GST component and a provincial component that varies from 8% to 10%, applies on the same basis as the GST. Accordingly, the discussion above regarding the GST also generally applies to the HST (including the discussion on the new registration requirements for digital economy businesses).

Once it is determined that a supply is made in Canada, it must then be determined whether the supply is made in a harmonized province and therefore subject to HST. Detailed rules apply to determine whether a supply is made in a harmonized province, which vary depending on the type of supply at issue.

Effective January 1, 2013, the Province of Québec harmonized the Québec sales tax (QST) with the federal GST; however, unlike other harmonized provinces, the QST is a separate tax imposed under provincial legislation. As a result, businesses doing business in Québec must consider whether they have an obligation to register for, collect and remit the applicable QST on their supplies made in Québec. As of January 1, 2023, the QST rate is 9.975%.

Provincial Sales Tax

British Columbia, Saskatchewan and Manitoba currently impose a single incidence provincial sales tax (PST) (in addition to the 5% GST) on end-users of most tangible personal property and certain services in their respective provinces. Businesses doing business in these provinces must consider whether they have an obligation to register for, collect, self-assess and remit the applicable PST under each applicable regime. General rates of PST vary from 6% to 7%. Unlike GST/HST/QST, which are generally recoverable by businesses throughout the supply chain, PST is non-recoverable. Although certain exemptions exist to relieve PST from applying throughout the supply chain (e.g., purchase for resale exemption), businesses may nonetheless pay unrecoverable PST in the course of doing business in these provinces.

In recent years, each province imposing a PST has enacted new legislation imposing registration and collection obligations for e-commerce businesses and platform operators. Businesses doing business in any of these provinces must closely examine these new rules, which apply broadly, to determine whether they apply to them or not.

Alberta is the only province that does not impose a PST; accordingly, only the 5% GST applies in Alberta.

Provincial Payroll Taxes

Manitoba, Ontario and Newfoundland and Labrador levy an employer payroll tax that is calculated based on a percentage of remuneration paid in the province (subject to a certain threshold). Québec also levies a similar employer tax in the form of contributions to a provincial health services fund.

Other Taxes

The federal government imposes other taxes, including customs duties and excise taxes. Various provinces also impose other taxes, including provincial capital taxes (often limited to financial institutions), fuel tax, carbon tax, insurance tax, real estate transfer taxes and underused housing tax. Most municipalities impose annual taxes on the ownership of real estate.

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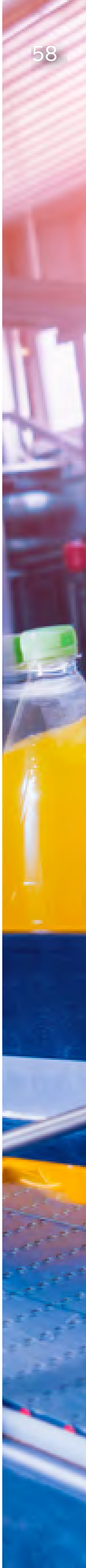
MANUFACTURE AND SALE OF CONSUMER GOODS

By Christopher Hubbard and Katherine Booth



MANUFACTURE AND SALE OF CONSUMER GOODS

The manufacture, importation, distribution, and sale of consumer goods are the subject of heavy regulation in Canada. Various statutes impose often stringent obligations on manufacturers, distributors and retailers, and grant regulators broad powers to enforce compliance, including through compliance audits, and to impose fines and penalties. Goods that fail to comply with the statutory requirements may not lawfully be sold in Canada and may be subject to recall. Manufacturers are also potential defendants in individual and class action product liability litigation relating to allegedly defective or unsafe products.

Regulation of Consumer Products

The *Canada Consumer Product Safety Act* (CCPSA) came into force in 2011. It applies to "consumer products" and prohibits the manufacture, importation or sale of consumer products that pose a "danger to human health or safety." The CCPSA gives the federal government the power to regulate, inspect, test and recall consumer products and creates a wide array of related offences and penalties. Manufacturers, importers and retailers need to comply with stringent requirements to maintain required records concerning their products, and report product safety "incidents" directly to Health Canada within short time frames.

"Consumer products" subject to regulation under the CCPSA are all products that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, with the exception of the products listed in Schedule 1 of the CCPSA. Generally, the excluded products are those covered by other specific legislation, including food, cosmetics, drugs, natural health products, medical devices, pest control products, firearms, and vehicles.

CONSUMER GOODS ARE THE SUBJECT OF HEAVY REGULATION IN CANADA, AND REGULATORS HAVE BROAD POWERS TO COMPEL COMPLIANCE AND IMPOSE PENALTIES.

Regulations made under the CCPSA may also impose additional compliance requirements for many specific types of products, including: candles; carbonated beverage glass containers; carriages and strollers; cellulose and fibre insulation; charcoal; children's jewelry; children's sleepwear; consumer products containing lead; consumer chemicals and containers; cribs, cradles and bassinets;

corded window coverings; face protectors for ice hockey and box lacrosse players; glass doors and enclosures; glazed ceramics; ice hockey helmets; infant feeding bottle nipples; kettles; lighters; matches; mattresses; pacifiers; phthalates; playpens; residential detectors; restraint systems and booster seats for motor vehicles; tents; textiles (flammability); toys; and vaping products.

The CCPSA grants Health Canada sweeping powers to audit businesses to assess compliance with their obligations under the legislation. Health Canada also conducts its own product testing and engages in a cyclical enforcement program in which products in various product categories are tested for compliance with various CCPSA regulations. Health Canada may also require a manufacturer or importer of a product to conduct testing on the product to confirm compliance with the CCPSA and regulations.

In addition to the CCPSA, federal statutes such as the *Food and Drugs Act*, the *Safe Food for Canadians Act*, the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act* (and regulations made under them), as well as a range of provincial regulations, can directly affect manufacturers whose consumer products are sold in Canada. For example, food, drugs, cosmetics, medical devices and natural health products are regulated by other legislation. Goods that do not comply with the statutory and regulatory requirements may not lawfully be sold.

A comprehensive regulatory review for all products is beyond the scope of this text, so manufacturers should familiarize themselves with the statutes and regulations applicable to the particular products they sell.

Consumer Protection

As noted above, Health Canada is a principal regulator of consumer product safety under the CCPSA, which prohibits the manufacture, importation or sale of consumer products that pose a “danger to human health or safety.” Manufacturers must report safety “incidents” to Health Canada within very strict timelines (two days for the initial report and 10 days for a follow up report). The definition of what constitutes a reportable “incident” is broad. Even if an event did not result in actual harm, it is a reportable incident under the CCPSA if the event did or “may reasonably have been expected” to cause a serious health effect or injury. Manufacturers, importers and retailers are also required to report recalls or similar measures involving the product anywhere in the world. Health Canada also receives reports directly from consumers.

Health Canada has the power to conduct compliance inspections to verify that manufacturers and suppliers are, among other things, familiar and complying with their incident-reporting obligations. Inspectors have the power to inspect a company's place of business and documents to carry out a compliance audit. Health Canada compliance audits can be triggered by a consumer report or report from someone else in the supply chain, and the government may also conduct an inspection in the absence of a report.

Provincial governments have also enacted consumer protection statutes, such as Ontario's *Consumer Protection Act*, 2002, which are aimed at providing protection for consumers in their dealings with corporations and businesses. These statutes impose various obligations on businesses in their dealings with consumers and provide consumers who have been harmed by deceptive or unconscionable business practices a variety of statutory remedies, including damages, punitive damages and rescission of agreements. Consumer protection legislation can also mandate specific, consumer-friendly contract terms, or prohibit or make unenforceable other contract terms, such as waivers of implied statutory warranties or terms requiring any disputes to be submitted to binding arbitration or purporting to ban a consumer from initiating or participating in a class action. There are differences between the consumer protection statutes in each province, so businesses should ensure their practices comply with the statutes of all provinces in which their goods are sold.

Consumer protections are also contained in the federal *Competition Act*, which contains provisions prohibiting misleading advertising and concerning the promotion of business interests. Making a representation to members of the public that is false or misleading in a material respect, and making this representation knowingly or recklessly, is punishable by substantial fines and even jail terms. False or misleading statements can also lead to liability to consumers for monetary damages. See **Competition Law**.

For a discussion of the application of consumer protection laws to online commerce, See **Information Technology — Consumer Protection — Internet Agreements**.

Product Liability

The sale of products alleged to be defective or to have caused injury or damage can give rise to litigation against product manufacturers as well as others in the supply chain. Common claims are claims for breach of a contract and in negligence but can also include other claims such as battery or unjust enrichment. Product liability claims are also popular subjects for class action litigation in Canada. See **Dispute Resolution — Class Actions**.

Contract claims are strict liability claims, and the absence of negligence is not a defence. All provinces and territories have sale of goods legislation that imply warranties of fitness for purpose and of merchantable quality into contracts between buyers and sellers of goods (see, for example, Ontario's *Sale of Goods Act*, R.S.O. 1990, c. S.1.). Parties can contract out of the statutorily implied terms, except in the case of consumer or retail sales.

Often, no contractual relationship will exist between a product manufacturer and the ultimate purchaser or user. In such cases, a buyer of a product generally cannot rely on the implied warranties under sale of goods legislation in a claim against the manufacturer. As a result, many claims against manufacturers are framed in negligence, as discussed below. However, the buyer may be able to assert a contract claim against the manufacturer for breach of warranty if a collateral warranty was provided by the manufacturer and that warranty is found to be a representation inducing the sale. As well, even where a consumer only has a breach of contract claim against the seller and not against the manufacturer, the seller may still seek contribution and indemnity from the manufacturer in relation to that claim.

Manufacturers and others may also be exposed to negligence claims arising from an alleged defect in a product. In order to succeed in a negligence claim, claimants must generally prove that a duty of care was owed to them; the product was defective; there was a failure to meet the applicable standard of care; and the claimants suffered damage caused by the defendant's negligence. Whether there is a "defect" in a product is a fact-specific inquiry with reference to the reasonably expected and foreseeable uses of the product. The mere presence of a defect in a product can justify an inference of negligence in the design or manufacturing process. Often, a product recall is used as a basis for alleging a defect and commencing litigation.

In defining the standard of care, Canadian courts will assess the reasonableness of the defendant's conduct with regard to industry standards. However, if the industry standard is inadequate, a defendant may be found negligent despite conforming to it. Although conformity with regulatory standards can be relevant to the assessment of reasonable conduct in a particular case, meeting those standards alone will not necessarily absolve a manufacturer of liability.

A manufacturer's common law duty of care is generally limited to taking reasonable care to avoid causing either personal injury or damage to property. However, in Canada, in some circumstances liability can still arise where there is no actual personal injury or damage to property caused. For example, consumers may be entitled to recover purely economic loss associated with avoiding the danger caused by an unsafe product, where a manufacturer's negligence resulted in defects that pose a real and substantial risk of actual physical injury or property damage.

In some circumstances, there may also be a common law duty on manufacturers or others to warn customers about a product defect or to initiate remedial action, such as a recall. The duty to warn is a continuing duty and can be triggered by information that becomes known after the product is in use. The existence and content of any duty to warn or take remedial action are fact-specific inquiries and depend on the circumstances of the case.

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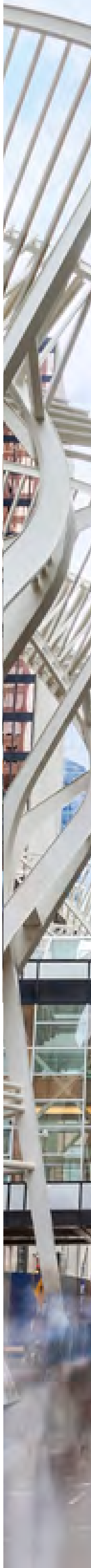
FRANCHISE LAW

By Adam Ship



FRANCHISE LAW

Overview

The franchise business model is commonly used in Canada and has experienced significant growth over the last decade. According to the Canadian Franchise Association, the leading national franchise industry group, approximately 1,200 franchised brands operate in Canada through 76,000 franchised units, employing directly or indirectly more than 1.9 million Canadians and generating approximately C$100 billion in annual revenue. Franchising is common across many industries in Canada, including quick-service restaurants, hospitality, home care, automotive retailing, telecommunications retailing, education and beauty/cosmetics.

Foreign franchisors can expand into Canada with or without opening a brand office or incorporating a local subsidiary. These decisions will be driven in large part by tax considerations.

Foreign franchisors often pursue expansion in Canada through master franchising or area development arrangements with Canadian companies that have a track record of successfully bringing foreign brands to the Canadian market. These structures essentially involve the foreign franchisor delegating a number of the roles that it usually plays in its domestic market to the Canadian master franchisee or area developer. A master franchisee will have territorial rights to grant sub-franchises on its own account and will often provide ongoing support to local sub-franchisees. The rights of an area developer, by contrast, are limited to opening multiple units directly or through an affiliate.

Foreign franchisors can also directly franchise in Canada. This involves the foreign franchisor (or its Canadian subsidiary) entering into franchise agreements with individual franchisees for specific units in Canada.

Several areas of Canadian law interact with the franchise business model in specific ways. Below, we focus on the most direct form of legal regulation of franchising in Canada: franchise-specific legislation. We also include a section on Québec.

Franchise-Specific Legislation in Canada

The jurisdiction to regulate franchising is held by Canada's provinces. To date, six provinces have enacted franchise-specific legislation: Ontario,

British Columbia, Alberta, Manitoba, New Brunswick and Prince Edward Island (Statutory Provinces).

While there are subtle differences between the franchise statutes found in the Statutory Provinces, they are largely consistent and focus on pre-sale disclosure. It is common for franchisors in Canada to use national Franchise Disclosure Documents (FDDs) where they grant franchises in more than one Statutory Province. Many franchisors will also voluntarily provide their national FDD to prospective franchises in non-statutory provinces.

A franchisor granting franchises in one of the Statutory Provinces must provide a prospective franchisee with an FDD not less than 14 days before the earlier of either: (i) the signing of the franchise agreement; or (ii) the payment of consideration by the franchisee.

FDDs must contain all material facts, which includes both facts that are specifically prescribed in the regulations passed under the applicable franchise statutes and all other facts that could reasonably be expected to have a significant impact on the value of the franchise or the franchisee's decision to purchase the franchise.

For example, the regulation passed under the Ontario franchise statute currently prescribes more than 25 different categories of information that must be included in an FDD. Some of the key subject areas include: (i) detailed background information about the franchisor, its directors and officers; (ii) upfront costs to the franchisee to establish the franchise; (iii) information concerning the closure of other franchises in the system; (iv) information about specific policies and practices of the franchisor, such as those imposing restrictions on goods and services to be sold and those relating to volume rebates or other financial benefits obtained by the franchisor; (v) information concerning the expenditures of any advertising fund to which the franchise must contribute; and (vi) information concerning territorial rights granted to the franchisee and/or reserved to the franchisor.

The FDD must also include all agreements relating to the franchise, as well as all other material facts beyond those specifically prescribed.

A number of court decisions have interpreted Canadian franchise legislation as requiring an FDD to include facts and information that are material to the individual location being granted to a franchisee, for example: (i) an FDD must include any head-lease entered into between the franchisor and the third-party landlord where the franchisor requires the franchisee to be responsible for the head-lease through a mandatory sublease; and (ii) one court has found an FDD to be deficient where it failed to disclose that the previous owner of the franchise seriously mismanaged the location.

As a result of these and other similar decisions, FDDs in Canada are drafted to include not only facts that are material to the franchisor and the franchise system, but also facts that are material to the individual franchise being granted.

Additionally, every FDD must contain the franchisor's financial statements in either audited or review-engagement form for the most recently completed fiscal year, unless an exemption is available to the franchisor. The FDD can include an opening balance sheet for the franchisor if either the franchisor has been operating for less than one year or 180 days have not yet passed since the end of the franchisor's first fiscal year.

Each of the Canadian franchise statutes currently contains an exemption from the requirement to include financial statements for large, mature franchisors that meet the prescribed criteria.

Where a "material change" occurs between the delivery of an FDD and the signing of the franchise agreement or the payment of consideration, a franchisor must also provide the prospective franchisee with a Statement of Material Change describing those material changes. This must be delivered as soon as practicable after the change has occurred.

Canadian franchise legislation contains a number of exemptions from the requirement to deliver an FDD. There are differences in the exemptions available in the various Statutory Provinces and the courts have generally interpreted the exemptions narrowly. Generally speaking, the exemptions are limited to where: (i) the franchisee already has intimate knowledge of the franchise system; (ii) the financial risk to and investment by the franchisee are very small; or (iii) the franchisee acquires the franchise from a third party without any active involvement of the franchisor.

Statutory rescission is the primary remedy to a franchisee who fails to receive an FDD or who receives a deficient FDD. Statutory rescission gives the franchisee the right to both terminate all franchise and ancillary agreements with the franchisor without penalty or further obligation and substantial financial compensation to put the franchisee back into its pre-sale position.

Given the scope of the rescission remedy, franchisors granting franchises in the Statutory Provinces have strong motivation to ensure their FDDs are fully compliant and up to date each time they are delivered to prospective franchisees. The length of time during which a franchisee may seek rescission depends on the gravity of the deficiency in the FDD: (i) a 60-day limitation period for minor, non-material deficiencies; or (ii) a two-year limitation period for significant deficiencies or failure to provide an FDD.

In addition to pre-sale disclosure, Canadian franchise legislation also establishes reciprocal duties of good faith and fair dealing for parties to a franchise agreement and provides franchisees with the right to associate with one another.

The duty of good faith requires the franchisor to consider the legitimate interests of its franchisees before exercising contractual rights, and imposes a standard of commercial reasonableness on the parties. The application of the duty is highly fact-dependent and there is a large body of case law that has interpreted the duty in the context of different types of franchise disputes.

Franchisors are prohibited from interfering with or restricting franchisees' statutory right to associate with one another in any way and any provision in a franchise agreement that attempts to restrict association between franchisees is void. This provision has been interpreted by Canadian courts to provide franchisees with the right to join together in litigation against the franchisor, for example in a class action.

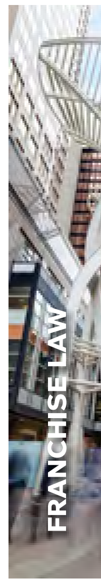
All Canadian franchise legislation expressly prohibits parties to a franchise agreement from contracting out of or waiving any of the rights or duties contained in such legislation. This means that a foreign franchisor granting franchises in the Statutory Provinces cannot use a choice-of-law clause or any other provision in its franchise agreements to avoid the application of these franchise-specific statutes.

Québec Civil Law

While there is no specific franchise legislation in force in Québec, the Civil Code of Québec (CCQ) may impose substantive obligations on franchisors.

Under the CCQ, "external clauses" (that is, contractual terms and conditions contained in ancillary documents outside the franchise agreement) must be brought to the attention of prospective franchisees at the pre-contractual phase to be enforceable against the franchisees. This may apply to certain provisions of a franchisor's operations manual which contain what are akin to contractual terms and conditions.

The Québec Court of Appeal has held that the duty of good faith under the CCQ requires a franchisor to bring to the attention of a prospective franchisee any information that might have a decisive impact on the prospective franchisee's willingness to enter into the franchise agreement (9150-0595 *Québec inc. v. Franchises Cora inc.*, 2013 QCCA 531). This constitutes a form of pre-sale disclosure obligation embedded within the CCQ's duty of good faith.



Once a franchise agreement has been entered into, the CCQ may also impose substantive implied obligations on franchisors, outside the written terms of the contract. In the franchising context, Québec courts have recognized fairly broad implied duties on franchisors arising from the nature of the franchise relationship, including:

- To inform.
- To provide technical and commercial assistance.
- To co-operate and collaborate.
- Loyalty.
- To respect the other party's reasonable expectations and commercial interests.
- To treat parties in similar situations consistently.
- To assist a co-contractor in difficulty and mitigate contractual damages despite clear contractual terms.
- To take reasonable measures to maintain the strength and relevance of the brand.
- Not to create false expectations.
- To exercise one's rights reasonably.

The above duties are owed by a franchisor to each individual franchisee and to the entire network of franchisees. The Québec courts have applied these implied duties to sanction conduct by franchisors, even where the franchise agreement did not expressly prohibit the applicable conduct.

For example, in one of the leading cases on the duty to co-operate in franchising, the franchisor developed a market strategy that put certain of its own corporate stores in direct competition with its franchisees. Nothing in the franchise agreement prevented the franchisor from competing with its franchisees and, in fact, the franchise agreement expressly favoured the franchisor on this issue. However, the Québec Court of Appeal held that the franchisor had breached its "implied obligations which form part of the broader contractual scheme." In the court's view, the franchisor's liability flowed from failing to assist its franchisees in adapting to the system change. The court held that the franchisor, bound by an obligation of good faith and loyalty to its franchisees, had a duty to work with them to prevent economic harm or at least minimize the impact of the system change (*Provigo Distribution inc. v. Supermarché A.R.G. inc.*, 1997 CanLII 10209 (QC CA)).

In 2015, the Québec Court of Appeal applied its earlier decision in *Provigo* in the context of a dispute between franchisor Dunkin Brands and some of its Québec franchisees. Based on the theory of implied obligations and the duty of good faith, the court read into the franchise agreement an implied obligation on the part of the franchisor to protect and enhance its brand and found that the franchisor had failed to do so. The franchisor was found liable for its failure to do anything in the face of the collapse of the brand in the regional market. Rather than respond to the franchisees' concerns regarding its declining brand, the franchisor sought to impose an expensive renovation program and required franchisees to sign a release preventing them from bringing a lawsuit of any kind against the franchisor. The court held that the franchisor had breached its implied duty to its franchisees and awarded substantial damages (*Dunkin' Brands Canada Ltd. c. Bertico inc.*, 2015 QCCA 624). The Québec Court of Appeal's reasoning was cited with approval by the Supreme Court of Canada in 2019 (*Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28).

REAL PROPERTY

By Paul Galbraith

REAL PROPERTY

Land Registration Systems

Each Canadian province has its own systems for registering interests in real property, as property legislation is constitutionally a provincial responsibility in Canada. In Ontario, for example, there are two land registration systems: registry and land titles. The older of the two is the registry system, which merely provides for the public recording of instruments affecting land and does not guarantee the status of title.

Most Ontario properties, however, are in the land titles system, which is operated by the province pursuant to the *Land Titles Act*. Title to land within this system is guaranteed by the province. Where the land titles system applies, each document submitted for registration is certified by the province and, until this certification is complete, the registration is subject to amendment at the request of the registry officials.

In other provinces, registration systems vary. In the western provinces, for example, land falls exclusively within the provincial land titles systems. These systems are similar to the land titles system in Ontario, creating an "indefeasible title" that is good against the world, subject only to certain limited exceptions. In the Atlantic provinces, on the other hand, registry systems dominate land registration, except in New Brunswick, where its land titles system encompasses most of the land in the province. Québec has its own unique system for registering interests in land, which in its effect is more similar to a registry system than to a land titles system.

Canadian provinces have been working to modernize their land registration systems by automating the paper-based records and converting to electronic systems. In most of Canada, real property instruments can be registered and obtained electronically. In addition, in many provinces, including Ontario, registration occurs in real time. In other words, upon registering an instrument against specific land, the instrument will immediately thereafter appear on the title relating to such land.

Planning Legislation

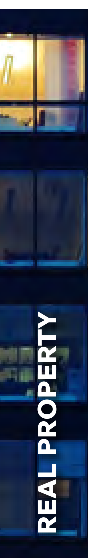
All Canadian provinces regulate property development to some degree, and often this regulation occurs at the municipal level. Official plans, zoning bylaws, development permits, subdivision bylaws and servicing bylaws are the primary means by which municipalities control land use and development.

At the provincial level, the subdivision of land is restricted by statute in a number of Canadian provinces. In Ontario, the *Planning Act* is the main statute that controls subdivision. In British Columbia and many other provinces, the *Land Title Act* of that province is the main statute that controls subdivision. In addition, most provinces have legislation granting power to municipalities to regulate the subdivision and servicing of lands. In most cases, instruments such as transfers, subdivision plans or separation of title, which result in the issuance of separate titles, and instruments such as leases, mortgages or discharges, which deal with part of a parcel, require subdivision approval.

MOST PROVINCES HAVE LEGISLATION GRANTING POWER TO MUNICIPALITIES TO REGULATE THE SUBDIVISION AND SERVICING OF LANDS.

Subject to certain exceptions, the *Planning Act* in Ontario prohibits any transfer or mortgage of land or any other agreement granting rights in land for a period of 21 years or more (this includes leases and easements) unless the land is already described in accordance with a plan of subdivision, or the transaction has previously received the consent of the appropriate governmental body. If the proposed transaction does not fall within one of the exceptions outlined in the *Planning Act*, then it may be necessary to obtain a severance consent for the transaction to proceed. The process to obtain a consent typically takes at least 90 to 120 days to complete.

A number of changes passed by the Ontario government directly impact how development-approval applications are prepared, submitted, processed and appealed. The cumulative effect of these changes has been to put greater control of the development-approval process in the hands of municipalities and the province itself. However, there is an appeal process for most applications to the Local Planning Appeal Tribunal, which has broad jurisdiction, so prudence requires applicants to look farther down the road, past the municipal process, to eventual appeals, and to take careful steps to put their applications on an appeal-ready footing from the outset. For this reason, engaging experienced legal counsel as early as possible in the development process is advisable.



Many provincial statutes (including Ontario's) provide that no interest in land is created or conveyed by an improper transaction carried out contrary to the governing legislation. Investors in real property in Canada need to consider the possible application of subdivision control regulations both at the provincial and municipal level when they are contemplating subdivision and development of land.

Title Opinions and Title Insurance

Rights in land are not required to be registered. That said, registration in the appropriate land registry office is essential to protect an owner's priority over subsequent registered interests and to protect an owner against loss from a bona fide third party. On an acquisition, in addition to registering a deed in the appropriate land registry office, a lawyer's opinion on title is typically issued to the purchaser of real property following closing.

However, the use of commercial title insurance as an alternative to the traditional lawyer's opinion on title continues to gain popularity, particularly for lenders (since the available protections are broader for lenders). Unlike a traditional lawyer's title opinion, title insurance provides protection against hidden risks, such as fraud, forgery and errors in information provided by third parties (e.g., a government ministry). Fraud, in particular, represents a significant loss when it does occur, and this is a risk generally better assumed by a title insurer. (Note, however, that for commercial properties, coverage is typically only provided for fraud that occurred prior to the date of placement of the policy.) Also, unlike a traditional lawyer's title opinion, title insurance is a strict liability contract — the policy holder is not required to prove that the title insurer has been negligent in order to receive compensation for a covered loss (up to the amount insured, which is typically the purchase price for an owner's policy and the mortgage amount for a lender's policy).

There are two types of commercial title insurance policies that may be issued: (i) an owner's policy that protects the purchaser against loss or damage arising from disputes regarding property ownership; and (ii) a loan policy that protects the lender against loss or damage arising from the invalidity or unenforceability of the lien of the insured mortgage.

While the benefits of an owner's policy remain in effect only as long as the insured owner possesses title to the property, the benefits of a lender's policy automatically run to the insured lender's successors and/or assigns, thereby facilitating the sale of mortgages in the secondary market.

There is a wide variety of different title insurance packages and varying premiums for such coverage, and there is no regulation of title insurance rates in Canada. Policy premiums are negotiated, and when a premium is paid to the title insurer, such premium constitutes consideration for both the policy and any endorsements (the total price of which is typically lower than the combined price for premiums and endorsements in the U.S.).

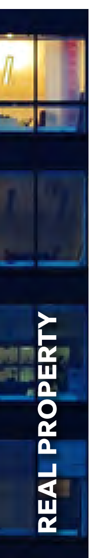
Environmental Assessments

In Canada, there is a legislative framework at both the provincial and federal level that governs the duties of land owners with respect to the storage, discharge and disposal of contaminants and other hazardous materials connected with real property. The liability for improper environmental practices runs with the land and can be inherited by future owners of the property. In certain circumstances, any "guardian" of a property, such as a tenant, may face liability for contamination. Additionally, it is incumbent upon a potential purchaser to inspect a property and assess environmental risks, as government officials in Canada cannot certify that properties are free of environmental risk. Commercial lenders in Canada will customarily require the completion of an environmental assessment of a property before the advance of funds.

THE LIABILITY FOR IMPROPER ENVIRONMENTAL PRACTICES RUNS WITH THE LAND AND CAN BE INHERITED BY FUTURE OWNERS OF THE PROPERTY.

Non-Resident Ownership

Non-residents may generally purchase, hold and dispose of real property in Canada as though they are residents of Canada, pursuant to the federal *Citizenship Act*, but subject to the restrictions set out in the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*. In addition, each province has the right to restrict the acquisition of land by individuals who are not citizens or permanent residents, in addition to corporations and associations controlled by such individuals. For example, in Québec, a non-resident (individual, corporation or any



other legal entity) is not entitled, directly or indirectly, to acquire farm land except with the authorization of the *Commission de protection du territoire agricole du Québec*.

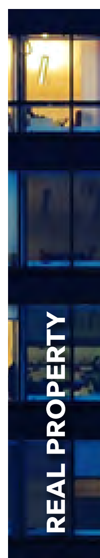
NON-RESIDENTS WHO DISPOSE OF REAL PROPERTY SITUATED IN CANADA ARE SUBJECT TO WITHHOLDING TAX REQUIREMENTS UNDER THE FEDERAL INCOME TAX ACT.

Each province has different legislation as regards to the particularities of foreign ownership of Canadian real property. In Ontario, for example, non-citizens have the same rights as Canadians to acquire, hold and dispose of real property, though corporations incorporated in jurisdictions other than Ontario must obtain a licence to acquire, hold or convey real property. Non-residents who dispose of real property situated in Canada are subject to withholding tax requirements under the federal *Income Tax Act* (ITA), as described below.

Overlaid on top of the above-noted rules are the requirements of the federal *Prohibition on the Purchase of Residential Property by Non-Canadians Act* and its associated regulations. As of January 1, 2023, and until January 1, 2025 (unless extended by further legislation), "Non-Canadians" (as distinct from non-residents) are prohibited from purchasing "residential property" within any census agglomeration area or census metropolitan area (e.g. most, if not all, medium to large municipalities).

"Non-Canadians" is broadly defined and includes: (i) any citizen of a country other than Canada; (ii) any corporation entity of which 10% of the equity interests or 10% of the voting rights are held by a citizen of a country other than Canada; (iii) a corporation or entity which is not formed under the laws of a Canadian province or the federal laws of Canada; and (iv) publicly traded corporations or entities which are controlled by another "Non-Canadian" entity and are not listed on a stock exchange designated under s. 262 of the ITA.

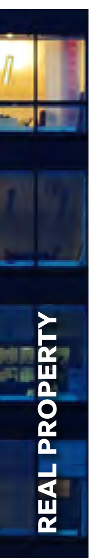
"Residential property" is defined to include: (i) detached houses or similar buildings containing not more than three dwelling units; and (ii) parts of buildings that are semi-detached houses, row-house units, or condominium units that are intended to be separately owned. We note that the original definition of "residential property" was



extremely broad and contained a reference to "mixed use zoning," which resulted in many commercial or industrial properties being considered "residential property." The above-mentioned regulations were amended on March 27, 2023 to remove the inclusion of these types of properties, such that the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* only applies to what would commonly be considered residential property.

Notwithstanding the above-noted restriction, the regulations to the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* provide that the acquisition of "residential property" by a "non-Canadian" for the "purposes of development" does not contravene the Act. Although there is no case law, legislation, or regulation governing or defining the words "purposes of development," it has been understood that having a good faith intent to develop or redevelop, engaging with the local planning or zoning regulator and other professionals (e.g. architects, engineers, lawyers, planners) as part of the proposed development, and/or proposing a change of use to a property will constitute "development." Conversely, acquiring property for the purpose of leasing or renting out property to tenants or otherwise managing a rental portfolio will likely not constitute "development," nor will undertaking repairs, renovations or similar modifications to an existing residential property.

Although the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* is generally not applicable to commercial properties, legal advice must be sought to ensure compliance, as contravention of the Act results in the contravening party (and any party that induces, aids, abets, counsels, or attempts to do the foregoing) being guilty of an offence under the *Criminal Code*.



Proceeds of Crime Legislation and Real Estate Developers

In January 2008, new amendments and regulations with respect to the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* were made. These came into force on February 20, 2009, and address transactions involving, among other groups, real estate developers (generally defined as those who sell new developments to the public, other than in the capacity of a real estate broker or sales representative). The amendments impose mandatory reporting and record-keeping requirements on real estate developers, who are obligated to report suspicious transactions, large cash transactions and any property in their possession that is owned or controlled by terrorists. They are also required to keep records of funds received, large cash transactions and client information, copies of official corporate records and suspicious transaction reports, and to ascertain the identity of any individual: (i) who conducts a large cash transaction (taking reasonable measures to determine whether that individual is acting on behalf of a third party); (ii) for whom they must keep a client information record or receipt of funds record; and (iii) for whom they must send a suspicious transaction report. They must also develop a compliance regime that includes, among other things, the appointment of a compliance officer, written compliance policies and ongoing compliance training programs. If real estate developers fail to comply with these requirements, criminal or administrative penalties may be imposed.

Some Taxes on the Transfer of Real Property in Canada

Withholding Obligations

The ITA contains provisions that protect Canada's ability to collect taxes when a non-resident disposes of "taxable Canadian property" (which includes, among other types of property, real property situated in Canada).

Unless (i) the purchaser has no reason to believe, after making reasonable inquiries, that the vendor is not a non-resident of Canada; (ii) the purchaser concludes after reasonable inquiry that the non-resident person is resident in a country with which Canada has a tax treaty, the property disposed of would be "treaty-protected property" if the non-resident were resident in such country, and the purchaser provides the Canada Revenue Agency with a required notice; or (iii) the purchaser is provided with an appropriate certificate in respect of the disposition issued by the Canada Revenue Agency, the purchaser will be liable to pay as tax on behalf of the non-resident up to 25% of the purchase price of land situate in Canada that is capital property and up to 50% of the purchase price of land inventory situated in Canada, buildings and other depreciable fixed-capital assets. If the non-resident vendor does not provide the purchaser with an appropriate certificate (or the purchaser is not satisfied that the conditions of either (i) or (ii) have been met), the purchaser will generally deduct from the purchase price the amount for which the purchaser would otherwise be liable. Québec tax legislation imposes similar requirements in respect of the disposition of immovable property situated in the Province of

Québec. It should be noted that gains realized by a non-resident on the disposition of Canadian real estate are generally not, subject to certain exceptions, exempt from tax under Canada's treaties, and therefore real estate in most cases will not qualify as "treaty-protected property" for purposes of the ITA. Accordingly, absent an appropriate certificate, most purchasers acquiring real estate from non-residents will withhold from the purchase price and remit the withheld amount to the applicable taxing authority.

Land Transfer Tax

In all Canadian provinces, land transfer taxes (or in Alberta, "registration fees") are generally imposed on purchasers when they acquire an interest in land (typically including a lease in excess of 40 or 50 years, though the threshold is 30 years in British Columbia) by registered conveyance and, in some cases, by unregistered disposition.

Provincial rates vary widely. In Ontario, for example, land transfer tax is calculated on the "value of the consideration" paid for the interest transferred, whereas in Alberta the fees assessed against a purchaser are based on the value of the land being acquired by the purchaser, and in British Columbia, the tax is calculated on the "fair market value" of the interest transferred. In Québec, the calculation is made on the basis of imposition that equals the greatest of: (i) the consideration furnished for the transfer; (ii) the consideration stipulated for the transfer; and (iii) the market value of the immovable property at the time of its transfer. Of note, the City of Toronto has recently mandated an additional land transfer tax for conveyances within the city that is roughly equivalent to the Ontario land transfer tax (resulting in what is essentially a doubling of the total land transfer tax payable when real property is conveyed in Toronto). In addition, the City of Montréal has, via bylaw, set a higher rate than what is provided for under the provincial legislation for the calculation of duties for any part of the basis of imposition that exceeds C$500,000.

Federal Goods and Services Tax, Provincial Sales Tax, and Harmonized Sales Tax

In Canada, the Goods and Services Tax (GST), currently at a rate of 5%, is generally payable upon a supply of real property (this includes a sale). See **Sales and Other Taxes — Federal Goods and Services Tax**. The vendor is responsible for collecting GST from the purchaser in respect of a sale of real property unless the purchaser is registered for GST purposes and required to self-assess the applicable GST. The conveyance of previously owned residential property is not subject to GST (except where such residential property has been "substantially renovated").

In provinces that have "harmonized" their provincial sales tax with the GST, the rate of the harmonized sales tax (HST) is generally payable on the sale of any non-residential real property and any new or substantially renovated residential property, on the same basis as the GST.

The same self-assessment rules that apply for GST purposes apply for HST purposes.

QST

The province of Québec harmonized the Québec sales tax (QST), and the same rules apply to real property (immovable) in Québec as for GST/HST purposes.

Financing

Real estate financing for commercial, industrial, retail, multi-family residential and mixed-use real property as well as condominiums, hotels, casinos and other types of real estate can be structured in a variety of ways, including:

— conventional mortgage lending;

— public and private capital market financing;

— portfolio loans;

— acquisition financing;

— permanent financing;

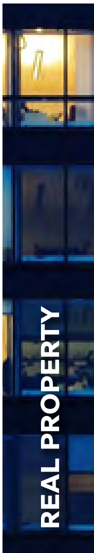
— public and private bond financings;

— syndications;

— restructurings; and

— securitization.

Banks, pension funds, credit unions, trust companies and other entities all arrange such financing on credit terms that vary on the basis of the transaction itself and the risks involved. Various rate and term combinations are offered. See **Bank Loans and Other Loan Capital**.



There are various instruments used to take primary security over real property in Canada, such as a mortgage or charge, a debenture containing a fixed charge on real property and trust deeds securing mortgage bonds (where more than one lender is involved). Additional security usually includes assignments of rents, leases and other contracts, guarantees and general security agreements.

Common Forms of Ownership/Interest

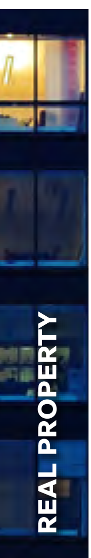
Generally, both asset acquisitions and share acquisitions are common in Canada. Canadian real estate transactions typically involve the following common forms of ownership/interest in real property: freehold, condominium, mortgage/charge, easements and leasing. In Québec, where the real property regime is based on civil law concepts, these forms of ownership/interest in real property all have their equivalents, but other types of interests, based mainly on surface or building rights, also exist.

Developments on Aboriginal lands are subject to a unique set of legal regimes governing ownership interests and security arrangements. See **Aboriginal Law**.

Common Investment Vehicles for Real Property in Canada

There are various avenues for investment in real property in Canada, including corporations, partnerships, limited partnerships, trusts, co-ownerships and condominiums. See **Business Organizations**.

Each of these vehicles has its own nuances and with careful planning and legal advice, investors in the Canadian real property market can structure their investments so as to take maximal advantage, for tax purposes or otherwise, of the available alternatives. A real estate investment trust (REIT) is a special type of trust whereby a trustee agrees to hold real property assets for the benefit of unitholders as the beneficiaries of the trust. The trustee (or more commonly, a corporate nominee) will hold legal title to the trust property. One disadvantage of this vehicle is that under common law, beneficiaries of a trust are potentially subject to unlimited liability. Commercial documentation, however, is generally crafted so as to limit such liability that may arise in relation to the assets or business dealings of the trust. Like shares of corporations, units of REITs can be publicly or privately held. The units of public REITs may be listed on public stock exchanges, like shares of common stock, and REITs



can be classified as equity, mortgage or hybrid.

The REIT structure was designed to provide a structure for investment in real estate that is similar to the one mutual funds provide for investment in stocks. Currently, a significant advantage to a REIT is that if its income is distributed to the unitholders, it will be taxed in their hands at their marginal rates rather than at the REIT level. REITs have been generally excluded from the income trust tax legislation changes the federal government enacted in 2007; these require income trusts to be taxed in the same manner as corporations beginning in the 2011 tax year. Legal advice is often necessary to determine whether a particular REIT falls within the exclusion provisions and to ensure the REIT continues to qualify for exclusion.

Co-Ownership Arrangement

A co-ownership arrangement is typically used where joint and several liability is not desirable. The advantages to using a co-ownership arrangement include the following: (i) each co-owner receives its own share of the revenues and pays its own share of expenses; (ii) each co-owner decides its own capital cost allowances, subject to the rules in the ITA; and (iii) each co-owner can sell, mortgage or otherwise separately deal with its interest.

Condominiums

Condominium ownership is a form of real estate ownership where the owner receives title to a particular unit and has a proportionate interest in certain common areas. Legal advice is needed to ensure that condominium projects satisfy all local policies and legislative requirements, including:

— structuring the project, e.g. common and shared facilities, exclusive use areas, commercial versus residential facilities, phasing and community associations;

— pre-selling units — preparing real estate disclosure statements or prospectuses, complying with securities and pre-marketing regulations;

— registering condominium/strata plans, declarations, descriptions and bylaws and developing policies; and

— closing and conveying the individual units.

Issues can include, for example, obtaining exemptions from the securities commissioner of a given province to permit the sale of rental pool units without a securities prospectus.

Nominees

Limited partnerships, REITs, trusts and even some corporations will often structure their business affairs so that a separate entity, usually a single purpose corporation, holds registered title to real property as "bare trustee," "agent" or "nominee" for the beneficial owner. For both tax and accounting purposes, the property belongs to the beneficial owner and appears on its balance sheet; it is not the property of the nominee. Although nominee arrangements may be used for several reasons, they are frequently established to facilitate dealing with property in the land registration system where there is a complex, underlying ownership structure — either to permit the beneficial ownership of the property to be kept confidential or to facilitate corporate reorganizations or third-party transfers on a land transfer tax-deferred basis.

Pension Funds

Canadian pension funds have been steadily increasing their presence in the Canadian real property market over the last few years through acquisitions of various portfolios, including Class A office buildings and shopping centres. Pension fund capital has, in fact, recently overtaken public real estate capital as the primary impetus of large real estate transactions in Canada. Pension funds that invest in real estate need to comply with strict national and provincial rules to retain their tax-exempt status.

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INFRASTRUCTURE

By Jim Janetos and Morgan Troke

INFRASTRUCTURE

Canadian governments utilize a variety of delivery models to procure and deliver infrastructure projects and services that address public service commitments. In addition, large infrastructure projects are a key component of Canada's and every province's economic stimulus packages.

One delivery model used with much success in Canada to deliver large infrastructure projects is the Public Private Partnerships (PPPs or P3s) model.

THE RESULT OF THE EXPERIENCE GAINED WITH THE LARGE NUMBER OF RECENT PROJECTS HAS BEEN A PROJECT PROCUREMENT PROCESS THAT ALLOCATES RISK REASONABLY BETWEEN THE PARTIES AND ACHIEVES VALUE FOR MONEY FOR THE PUBLIC.

Canada currently enjoys a mature and robust PPP market with Canadian PPP projects in various industry sectors, including light rail and other mass transit, roads, bridges, hospitals and health care, justice and corrections, schools, recreation and culture, water and wastewater, airports and civil aviation, ports, energy, universities, government services, property management, data centres, defence and communications. Over the course of the last 20 years the experience, expertise and capabilities related to PPP projects in Canada have grown dramatically, both in the public infrastructure procurement authorities, and also in the major investor entities, construction companies and service providers who constitute the participants in PPP projects.

Notwithstanding the success of the PPP delivery model, Canadian public procuring authorities are now developing other delivery models to address growing market pressures related to certain risk allocations within the P3 model and other traditional delivery models. One new model emerging incorporates a new phase in the project delivery timeline — a period during which the public authority and the private sector work collaboratively to develop the project's design, reduce (or identify more accurately) construction and delivery risks and finalize project costs/ pricing for the infrastructure project. These models, commonly referred to as the progressive design-build model or the progressive P3 model, are currently being used in Canada in the context of complex transit projects and hospital projects.

The result of the experience gained with the large number of recent projects has been the development of project procurement processes that allocate risk reasonably between the public sector and the private sector — thereby achieving value for money for the public. The recent projects have been procured under a clear and competitive process and that process has been steadily refined by the development of common and consistent "best practices" across Canada.

The Canadian infrastructure market is highly competitive, and includes both domestic and international constructors, service providers, equity providers and lenders. In most Canadian projects, there is no "local source" requirement and international companies are encouraged to participate. However, project teams must pre-qualify in order to participate in the RFP process and usually only three teams are qualified, so that smaller international participants often initially enter the market as part of a consortium.

International banks were major participants in PPP infrastructure financing prior to 2008, but their high level of participation has declined, and they have been replaced by a combination of primarily Canadian banks with a smaller number of international banks (providing debt financing primarily during construction) together with an active private placement and broadly marketed bond market in Canada and the U.S. (providing primarily longer-term debt).

Government support for infrastructure projects in Canada is generally strong at both the federal and provincial level (although it varies somewhat by province) as the current methods being utilized to procure and deliver projects have proven to address the infrastructure backlog.

Many federal, provincial and municipal governments in Canada have established dedicated agencies, which manage the process of using PPPs to achieve the completion of infrastructure projects. These agencies include Infrastructure Ontario, Infrastructure BC, Alberta Infrastructure, Infrastructure Québec, SaskBuilds, Nova Scotia's Department of Transportation and Infrastructure Renewal, and Partnerships New Brunswick. Also, the Government of Canada has established the Canada Infrastructure Bank, a Canadian Crown corporation operating at arm's length from the government. The Canada Infrastructure Bank is to work with provincial, territorial, municipal, federal, Indigenous and private sector investor partners to build infrastructure across Canada (with a focus on large, transformative projects, such as regional transit plans, clean energy, transportation networks and electricity grid interconnections), by providing federal support to such partners to ensure the commercial viability of their projects. In addition to the public sponsors of projects, there is a growing trend among large pension funds and private equity firms to identify large infrastructure projects, which may be suitable for their portfolios (assuming construction and delivery risks are (or will be) clearly identified), and then actively promote these opportunities within government. An example in this regard is CDPQ Infra, a subsidiary of Caisse de dépôt et placement du Québec, which proposed the Réseau express métropolitain project (REM) in Montréal, a 67-km, light rail, high-frequency network for the Greater Montréal area.

EACH PROCUREMENT AUTHORITY TENDS TO UTILIZE ITS OWN STANDARD RFP PROCESS AND BID REQUIREMENTS OVER ALL OR MOST TYPES OF PROJECTS UTILIZING COMMON BID SUBMISSION DOCUMENTS, THE SAME PROJECT DOCUMENTS NEGOTIATION PROCESS AND ESTABLISHED CLOSING PROTOCOLS.

There are several different models of PPP in Canada including build finance, design-build-finance, design-build-finance-maintain (DBFM) and concession, in all of which the project entity is compensated by milestone payments (often paid upon achievement of substantial completion of construction), availability payments, project revenue or a combination of them. In a typical DBFM PPP:

— a private entity (usually a consortium of one or more equity providers with one or both of a construction contractor and a service provider) (Project Co) and the government/public sector entity enter into a single contract under which Project Co accepts responsibility to design, build, finance and maintain the infrastructure asset;

— the project is delivered by Project Co, which contracts with a construction contractor to design and build the infrastructure, and with a service provider to operate and maintain the infrastructure asset;

— the operation and maintenance obligation extends over a long period (usually 25 to 35 years) with predefined hand-back conditions;

— operating and maintenance requirements are performance based;

— construction costs are primarily financed by debt and equity, and payment from government or the public sector entity begins upon completion of construction and extends over the operation and maintenance term (with interim payments during construction in many cases); and

— payments from government or public sector entities are subject to deduction for failures in service delivery.

The emerging progressive DBFM delivery model modifies the typical DBFM PPP characteristics by introducing a development phase during which the government/public sector entity and private sector entity contractually agree to work collaboratively for a specified period to progress the design of the infrastructure project and identify and price the associated construction and delivery risks. This development phase precedes the execution of the DBFM project agreement for the project.

Every province in Canada has its own regulatory and legislative requirements, but there are significant similarities in the procurement process and documentation. The Canadian jurisdictions utilizing PPPs and other delivery models share a desire to utilize an efficient and consistent procurement process followed by a short closing period. The process is administered by well-staffed and experienced procurement agencies that routinely publish RFP documents and project agreements, as well as value for money reports. The procurement is intended to be transparent and may be subject to the supervision of a "fairness monitor," and all elements of the procurement process have become increasingly standardized.

Each procurement authority tends to utilize its own standard RFP process and bid requirements over all or most types of projects — utilizing common bid submission documents, the same project documents negotiation process and established closing protocols. Bid submissions for P3s are required to be for a fixed price and to include committed or underwritten financing. There are varying but always short periods from the selection of the successful bidder to closing, based on the settled documents and committed financing at bid submission.

The Canadian infrastructure market is expected to remain active in the coming years as all levels of government have witnessed the benefits of using PPPs, and now progressive delivery model, to procure and deliver infrastructure projects and related public services.

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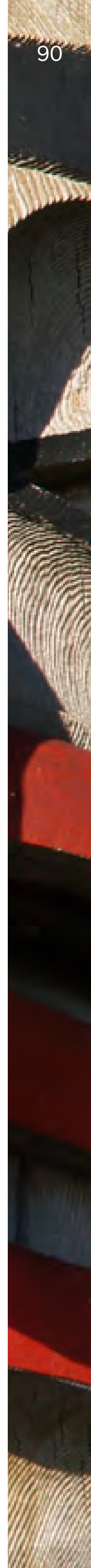
ABORIGINAL LAW

By Bryn Gray



ABORIGINAL LAW

Business transactions and projects in Canada can impact or involve Canada's Indigenous communities and engage issues of Aboriginal law, which is the body of Canadian law relating to Canada's Indigenous Peoples. While many businesses have successfully engaged and partnered with Indigenous communities, this is a rapidly evolving area of law and practice and the effective navigation of Indigenous issues is critical to successful project development in Canada. Where Indigenous issues exist for any proposed transaction or project, it is important to consider the issues in the context of the current law and prudent business practices and to develop business strategies that are most likely to achieve the desired results.

Overview

Aboriginal rights and claims are frequently implicated by the acquisition and development of land and natural resources in Canada. This is particularly the case for energy, mining, forestry and transportation projects, which often have the potential to impact lands and waters subject to claims of Aboriginal or treaty rights.

By way of background, there are three distinct Aboriginal Peoples of Canada that are recognized in the *Constitution Act, 1982* — First Nations, Inuit, and Métis. Within these groups, there are 619 *Indian Act* bands (representing approximately 50 distinct First Nations), 53 Inuit communities in four distinct regions, and six representative provincial and national Métis organizations. There are significant cultural and historic differences between and among these groups and the nature and scope of their asserted or established rights vary considerably.

In 1982, the Aboriginal and treaty rights of First Nations, Métis and Inuit peoples in Canada became constitutionally protected through the enactment of s. 35 of the *Constitution Act, 1982*. While this significantly increased the protection of Aboriginal and treaty rights in Canada, the Supreme Court of Canada has recognized that these rights are not absolute and can be infringed by the Crown if certain requirements are met.

The law regarding Aboriginal rights and title continues to evolve. Business practices relating to Indigenous communities also continue to change to keep up with developments in the law, government policies and the expectations of Indigenous communities, which can exceed what is required by law. In addition, Indigenous groups are becoming increasingly active in the commercial marketplace as service providers/suppliers, equity participants and in public-private partnerships. It is important to understand both the communities, as well as the issues involved with the making of contracts and the taking of security where Indigenous participants are involved.

Jurisdiction Over Aboriginal Peoples

Canada's federal Parliament has exclusive legislative jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*. This has been interpreted to include First Nations, Inuit, and Métis peoples. The federal government has enacted a range of legislation mostly for First Nations, including the *Indian Act*, the *First Nations Fiscal Management Act,* the *First Nations Land Management Act*, the *First Nations Commercial and Industrial Development Act* and the *Indian Oil and Gas Act*.

While the federal government has exclusive jurisdiction over Canada's Indigenous Peoples, provincial and territorial laws of general application still typically apply to First Nations, Métis and Inuit in each jurisdiction.

Aboriginal Rights and Interests

The Supreme Court of Canada has recognized that there is a duty to consult and potentially accommodate Indigenous groups where the federal, provincial, and territorial governments are making a decision that could adversely affect asserted or established Aboriginal or treaty rights. This duty is triggered for the vast majority of Crown approvals for resource development and is discussed further below, following a general overview of Aboriginal and treaty rights.

Aboriginal rights are rights that arise from practices, customs and traditions that were integral to the distinctive cultures of Indigenous communities pre-contact. Aboriginal rights can include but are limited to harvesting rights , such as hunting, trapping, fishing and gathering. It can also include Aboriginal title, which is a sui generis right in land that is distinct from other proprietary interests, such as fee simple estates.

Aboriginal title confers a broad bundle of rights similar to fee simple, including the right to use, manage and derive economic benefits of the land. However, there are three important limitations that ensure continuity of the Indigenous group's relationship with the land: (i) the land must be collectively held; (ii) it cannot be alienated except to the Crown; and (iii) it cannot be encumbered, developed or misused "in a way that would substantially deprive future generations of the benefits of the land."

To date, Aboriginal title has only been established in one case. In 2014, the Supreme Court of Canada found that the Tsilhqot'in Nation had established Aboriginal title over a tract of land in central British Columbia. The Court held that if Aboriginal title is proven, the consent of the Indigenous group is required in order for the Crown or a proponent to proceed with development or use of the Aboriginal title lands. Absent such consent, the Crown would need to justify any proposed incursion onto the land or infringement of title by a compelling and substantial governmental objective that was consistent with the Crown's fiduciary duty to the Indigenous group.

The majority of Aboriginal title assertions in Canada are in British Columbia and most of these assertions have some degree of overlap with the Aboriginal title assertions of other Indigenous groups in the province. In addition, there are also unsettled Aboriginal title claims in the north, Alberta, Ontario, Québec and Atlantic Canada, as well as Métis claims in Manitoba and Saskatchewan. Some of these claims also include assertions of Aboriginal title to water beds or bodies of water. There have been two Aboriginal title claims to waterbeds that have been judicially considered to date and both claims were dismissed but are under appeal.

Although there are Aboriginal title assertions throughout Canada, Aboriginal title has been surrendered, modified or is no longer asserted in many areas of the country pursuant to treaty, such as the claims of Indigenous signatories to the 26 modern treaties and the 11 historic numbered treaties. These treaties — and other historic treaties with land surrender provisions — cover Northern Québec, much of Ontario, Manitoba, Saskatchewan, Alberta, portions of B.C., Nunavut, and large portions of the Yukon and Northwest Territories. Aboriginal title assertions are nonetheless relevant for certain historic treaties, including the numbered treaties, as some Indigenous groups challenge the validity of the land surrender provisions, dispute the boundaries of the treaty, or argue that they are not treaty signatories.

Treaties

Many Indigenous Peoples have rights set out in historic and modern treaties.

There are approximately 70 recognized historic treaties and 26 modern treaties in Canada. These treaties cover much of the country's land mass, as discussed above, but differ significantly in their length, terms and original purpose. Historic treaties, which were entered into prior to 1975, are generally quite short and recognize rights, such as hunting, fishing, trapping and trade for a moderate livelihood, among other things. Some of these treaties include land surrender provisions while others do not. Modern treaties are much more detailed agreements and confer a broader range of rights and benefits from harvesting rights to subsurface rights, self-government provisions, fee simple ownership of specific lands and significant capital transfers.

Consultation and Accommodation

As noted above, the Crown has a duty to consult and potentially accommodate Indigenous groups when it is making a decision or issuing an approval that may adversely affect asserted or established Aboriginal or treaty rights. This is a constitutional duty and the obligations imposed by the Crown's duty can often be significant and require consultation with many different Indigenous groups, some of which may have overlapping claims or interests.

The scope of what consultation and potential accommodation is required varies and is proportionate to the strength of the case supporting the existence of the Aboriginal or treaty right and the degree of the potential adverse effect of the Crown's decision on that asserted or established right. Where the claim is weak and the impacts will be minor, the Crown may only be required to consult at the low end of the spectrum by giving notice, providing information and discussing issues raised in response. In other cases, where the claim is strong or there are established rights and the impacts will be significant, deep consultation may be required, which may entail the opportunity to make submissions and participate in the decision-making process, accommodation and the provision of written reasons.

Regardless of what level of consultation is required, it must be conducted in good faith and be meaningful. The duty to consult is not intended to simply provide a process to exchange information or an opportunity for Aboriginal groups to "blow off steam." Serious consideration needs to be given to concerns raised and the Crown must be prepared to make changes based on the input received. There is no stand-alone duty on the Crown or a project proponent to reach agreement with Aboriginal groups, but good faith consultation may give rise to a duty to accommodate. At law, accommodation can include mitigating, minimizing or avoiding adverse effects of actions or decisions on asserted or established Aboriginal or treaty rights. What amounts to appropriate Crown consultation and accommodation is a matter for legal analysis on a case-by-case basis. Inadequate Crown consultation or accommodation can lead to approvals or permits being delayed or called into question, community and investor relations' challenges or litigation for injunctions or damages, all of which can have serious impacts on project schedules and costs.

Although the duty to consult is ultimately the responsibility of the Crown, the courts have stated that procedural aspects of this consultation may be delegated to and carried out by project proponents and that the duty can be discharged through regulatory processes provided the specific process is sufficient to satisfy what is required in the circumstances. It is not uncommon for the Crown to pass on certain requirements associated with the duty to consult to project proponents who are seeking government approvals. In many cases, the proponent will have the greatest familiarity with the proposed project and will be best suited to engage with Indigenous groups and to address any relevant concerns in a meaningful way.

Many Indigenous groups have developed their own consultation policies and processes for engaging with proponents and the Crown, and many have capacity funding requirements. Proponents are frequently asked to provide capacity funding to Indigenous groups, including funding third-party Indigenous knowledge and land-use studies to determine the extent of Indigenous interests and the potential impact of proposed projects. Capacity funding can be required to ensure consultation is meaningful, but whether funding is required will be fact-specific and consultation obligations may be fulfilled in the absence of funding.

Within the context of major resource projects, the Crown's duty to consult usually will be triggered at the formal commencement of the regulatory review process. However, many proponents choose to engage with Indigenous groups from the earliest stages of project planning in order to build relationships with local communities. Early and effective consultation and engagement with Indigenous groups has become one of the most critical factors affecting the viability and ultimate success of a project and therefore should be treated as an integral part of project planning and development. Experienced legal advice is required to guide the proponent through the consultation and approval process in order to ensure that all relevant Indigenous groups are being consulted and that the Crown's duty is properly carried out and documented for evidentiary purposes.

Indigenous groups have been increasingly raising the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in project consultation and asserting that projects cannot proceed without their *Free, Prior, and Informed Consent* (FPIC). The federal and B.C. governments have both passed framework legislation and released action plans to implement UNDRIP. This legislation does not give legal effect to UNDRIP but is intended to provide a framework to implement the Declaration over time. Both governments have stated that UNDRIP does not provide Indigenous groups a veto over resource development and appear to be interpreting consent as an objective rather than an absolute requirement in all circumstances.

Successful Agreements with Indigenous Groups

There is currently no requirement at law for the Crown or proponents to enter into agreements with Indigenous groups in order to fulfil the Crown's duty to consult or accommodate Indigenous groups, and there is no requirement at law for accommodation to include economic compensation to Indigenous groups. However, it is common for federal and provincial governments to promote agreements, such as impact-benefit agreements or participation agreements between project proponents and Aboriginal Peoples, and certain governments are increasingly expecting agreements to be in place before issuing an approval. In some cases, a province will also enter into an agreement where tax or other government revenue is shared with interested Aboriginal groups. Reaching successful agreements can assist in addressing the concerns of Indigenous groups, establish stable frameworks allowing development projects to move forward and provide an effective means of managing Aboriginal-related risks and establishing regulatory certainty for projects.

The scope and content of benefit and participation agreements vary widely among projects and Indigenous groups. Understanding the specific interests and objectives of an Indigenous group and having experience with the different types of agreements in use is important when working in this area. Agreements with Indigenous groups can include a variety of benefits for the Indigenous group, including employment opportunities, support for education and training initiatives, contracting and business opportunities, and in some cases financial benefits, such as an annual royalty payment or equity interest with corresponding assurances to the proponent that create certainty and facilitate the development of the project. In some cases, agreements will formalize future engagement processes for the life of a project and include environmental monitoring and protection commitments.

Major projects increasingly provide for a range of economic benefits including equity participation, through a variety of financial models, for affected Indigenous groups that are seeking to secure ownership interests and long-term revenues for their communities. Projects that involve Indigenous equity participation often involve more sophisticated advice in order to ensure that the project is financeable and employs the most efficient tax structure for all parties.

Projects on Indigenous Lands

Increasingly, projects and project assets are being located on lands held by Indigenous groups themselves. There are different types of Indigenous lands and political structures in Canada and a number of different regimes that may apply. Specific knowledge of the applicable regime is critical, particularly for developments on First Nations' reserve land. Federal laws often do not adequately cover developments on Indigenous lands and both federal and provincial regulators often have significant concerns regarding matters, such as the lack of applicable provincial environmental protection regimes, particularly on major projects. In some cases, these concerns are addressed contractually. In others, the federal *First Nations Commercial and Industrial Development Act* is used by Indigenous groups, federal and provincial governments and project proponents to voluntarily apply specified provincial laws to projects on Indigenous lands where there otherwise would be a "regulatory gap" in the federal regime.

Conclusions

Projects in Canada that involve Aboriginal rights and interests require specialized legal knowledge and experience. The regulatory regimes and case law relating to Aboriginal rights and interests are constantly evolving and it is important to bring the most current information to any project where Aboriginal rights or interests may have an impact. Understanding the potential scope of the rights and interests and building successful relationships and agreements with Indigenous groups from project inception through completion and implementation are key elements of any successful project.

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INTELLECTUAL PROPERTY

By Dan Glover and Vincent Yip

INTELLECTUAL PROPERTY

The federal laws on patents, copyright and trademarks provide the principal protection for intellectual property in Canada. Canada is a member of the World Trade Organization (WTO) agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and has agreed to the minimum standards of protection and reciprocal treatment provided in this treaty. In January 2018, Canada and 10 other member countries entered into the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement* (CPTPP), which Canada ratified, and which came into force on December 30, 2018. Canada is also a party to the 2016 *Comprehensive Economic and Trade Agreement* with the European Union (CETA).

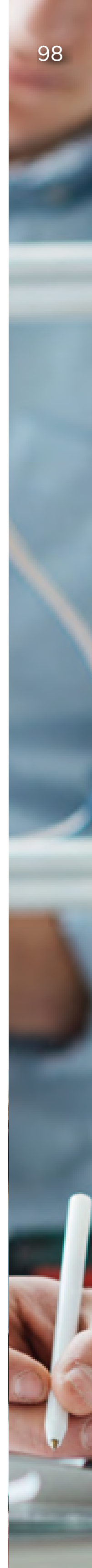
Patents

Canada is a member of the *Paris Convention* for the *Protection of Industrial Property* (Stockholm Act), the *Patent Cooperation Treaty* (PCT) and the *Patent Law Treaty* (PLT).

The *Patent Act* provides that any new, useful and non-obvious invention that falls within the statutorily defined meaning of invention, namely, art, process, machine, manufacture or composition of matter (or any improvement thereof) is patentable. There is no requirement that the invention be made in Canada. Higher life forms per se are not patent eligible, but engineered genetic material and cell lines containing such genetic material may be patent eligible. Algorithms per se are not patent eligible, but computer program products or methods that manifest a discernible effect or change may be patent eligible.

CANADA IS A MEMBER OF THE *PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY* AND THE *PATENT COOPERATION TREATY.*

In a landmark decision rendered in October 2010, the Federal Court overturned a rejection by the Commissioner of Patents and the Canadian Patent Appeal Board of a patent application by Amazon.com for its "one-click" online product-ordering technology. The Commissioner of Patents had held that Amazon's claimed invention was not directed toward patent-eligible subject matter under the *Patent Act*. In overturning this finding, the Federal Court articulated that computer implemented innovations and business methods may be patent eligible in Canada as long as they meet the general test of what constitutes an "invention" under s.2 of the



Patent Act. In late 2011, the Federal Court of Appeal allowed the appeal of the Federal Court decision. The Court of Appeal dismissed the view that a business method should be patent eligible merely because it has a practical embodiment or a practical application. Instead, the Court of Appeal held that the proper approach to determining patentable subject matter is to first “purposively construe” the claims to identify the “essential elements” of the invention and then consider whether the identified essential elements would be considered patent eligible-subject matter. The Court of Appeal agreed with the Federal Court that patentable subject matter could be either something with a physical existence or something that manifests a discernible effect or change. The Court of Appeal remanded the construction of the patent claims back to the Commissioner of Patents, and the application was issued by the Patent Office shortly thereafter.

In 2020, the Federal Court confirmed in *Choueifaty v. Canada,* 2020 FC 837, that a recited claim element is essential as long as the claim element is not clearly intended by the patentee to be non-essential, and the claim element could not be substituted without affecting the working of the invention in the eyes of the skilled addressee at the date of publication of the patent. In response to the *Choueifaty* decision, which clarified the correct method of purposively construing the claims to identify the essential elements thereof, the Patent Office published a practice notice to provide further guidance to applicants and its patent examiners during prosecution.

In June 2022, the Federal Court issued its decision in *Benjamin Moore & Co. v. Canada*, 2022 FC 923, where the Federal Court adopted, and instructed the Commissioner of Patents to use, a three-step framework to assess the patentability of computer-implemented inventions. However, in July 2023, the Federal Court of Appeal allowed the Patent Office’s appeal of the trial court decision and deleted the requirement for the Commissioner of Patents to use the three-step framework to assess patentability, replacing it with a direction to determine patentability of the inventions in light of the most current version of the *Manual of Patent Office Practice* with the benefit of the court’s reasons. It remains to be seen what framework the Patent Office will adopt in light of the Federal Court of Appeal’s decision.

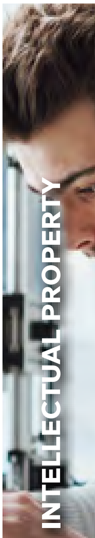
Another noteworthy decision was the judgment of the Supreme Court of Canada in *AstraZeneca Canada Inc. v. Apotex Inc.*, 2017 SCC 36, where our highest court unanimously rejected the so-called “promise doctrine” to assess the utility of a patent. The doctrine requires reviewing the patent

as a whole to identify "promises" associated with the disclosed invention, and then determining whether the identified promises are met. Under this approach, a patent could have been held to lack utility even if it had met all but one of the identified promises. The Supreme Court of Canada found this doctrine to be "unsound" and "not good law" for determining whether the utility requirement under s.2 of the *Patent Act* is met. Instead, the Supreme Court of Canada set out a two-step test that involves first identifying the subject matter of the invention as claimed in the patent, and then asking whether the subject matter is capable of a practical purpose. The Court reaffirmed that "a scintilla of utility will do" to meet the utility requirement.

THE APPLICATION IN CANADA MUST GENERALLY BE FILED BEFORE THE INVENTION IS MADE AVAILABLE TO THE PUBLIC ANYWHERE IN THE WORLD.

In a patent infringement case between Dow Chemical and Nova Chemicals, the patentee elected to pursue the infringer's profits rather than to seek damages. In the *Dow Chemical Company v. Nova Chemicals Corporation*, 2022 SCC 43 decision, the Supreme Court of Canada upheld the lower courts' earlier judgment awarding Dow Chemical the largest monetary award for patent infringement in Canadian history, at nearly C$645 million. This amount included the infringer's profits during the life of the patents, legal costs and prejudgment interest. In determining the infringer's profits, the Supreme Court of Canada upheld the lower courts' award of "springboard" profits earned by the infringer during a period of time after the expiration date of the patent. The springboard profits accounted for the accelerated market entry enjoyed by the infringer by making the infringing product prior to the patent's expiration. The magnitude of the remedy affirmed by the Supreme Court of Canada in *Dow Chemical v. Nova Chemical*, together with the foregoing decisions of the Supreme Court of Canada, may encourage more parties to file and enforce patents in Canada.

A Canadian patent grants its owner the right to exclude others in Canada from making, selling or using the invention during the term of the patent. The term of a Canadian patent is 20 years from the date of filing of the application, provided that all maintenance fees are paid in a timely manner. Since 1989, Canada has adopted a "first-to-file" system, which grants patents to the first inventor to file an application for the invention. To be entitled to a patent in Canada, the applicant must file the application in Canada before the invention is made available to the public anywhere in the



world. A grace period of one year is permitted for disclosures originating directly or indirectly from the inventor. It is generally recommended for applicants to file as early as possible in Canada or in a *Paris Convention* country, and to not rely on the grace period. Information that has been made available to the public prior to the date of filing of an application is known as "prior art" and includes prior use of the invention and prior publications (e.g., publication of an earlier patent application). In Canada, patent applications are published 18 months after the earliest filing date claimed by the applicant.

Recent amendments to Canada's patent legislation herald some significant changes. One important change is the implementation of "prosecution history estoppel," or "file wrapper estoppel," in the context of patent litigation. Under this amendment, a patentee's representations regarding the interpretation of patent claims during prosecution are admissible to rebut assertions or representations about the construction of the patent claims made by the patentee during litigation. The newly enacted file wrapper estoppel provision was interpreted by the Federal Court of Appeal in the recent *Canmar Foods v. TA Foods*, 2021 FCA 7, decision where the Federal Court of Appeal held that the trial judge erred in making reference to the patentee's U.S. prosecution history in the circumstances but refrained from deciding whether statements made during foreign prosecution could ever be considered for the purposes of claim construction.

Another noteworthy change that affects the scope of protection available to Canadian patents is the introduction of a new provision that codifies an "experimental use" exception to shield certain experimental uses of patented inventions from patent infringement liability. The provision also enables the establishment of regulations in respect of factors that should be considered in assessing whether a particular use can benefit from this exception. The scope of this exception remains to be seen, as no regulations have been introduced and the provision itself has not been considered judicially.

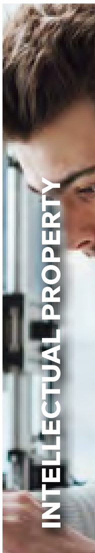
Pursuant to the CETA, the *Patent Act* has been amended to provide for the issuance of Certificates of Supplementary Protection. A Certificate of Supplementary Protection effectively extends the term of an eligible patent by up to two years to assist in compensating patentees for the effective loss of patent term as a result of pursuing regulatory approval for drugs in Canada. The CETA also introduced other changes to the *Patented*

Medicines (Notice of Compliance) Regulations, which brought in significant changes to the pharmaceutical industry in Canada, including replacement of current Notice of Compliance summary proceedings with full actions that can result in final determinations of patent infringement and validity. The CETA implementations came into effect on September 21, 2017.

CANADA HAS ACCEDED TO THE WIPO COPYRIGHT TREATY AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY.

As part of the Canadian government's efforts toward ratification of the PLT, amendments to the *Patent Rules* came into force on October 30, 2019. One of the changes is the restoration of priority claims, allowing an applicant a two-month grace period to claim priority to an earlier filed application if the applicant unintentionally failed to meet the 12-month priority deadline. This change aligns Canadian practice with existing restoration of priority mechanisms available under the PCT. Filing requirements have also been relaxed under the amended *Patent Rules*. For example, an applicant can now obtain a filing date even if the filing fee is not paid on the date of filing. However, under the new regime, applicants will no longer be entitled to an extended 42-month national phase entry (i.e., standard 30-month deadline plus a 12-month extension with payment of a late fee) as of right. While a late national phase entry is still available, the applicant will have the onus to show that the failure to meet the set deadline was unintentional. Prosecution deadlines have also been shortened under the new *Patent Rules*. For example, the deadline to request examination of a patent application has been shortened from five years to four years from the filing date, and the standard deadline to respond to an examiner's report has been shortened from six months to four months from the date of the Report. Other changes include: a new procedure for reinstating abandoned applications, a new regime establishing deadlines for correcting certain clerical errors, and the introduction of a system of "third-party rights" that allows third parties to practice a patented invention if the patent is not in good standing.

Finally, as part of Canada's obligations under the *Canada-United States-Mexico Agreement* (CUSMA), amendments to the *Patent Act* will come into force, no later than January 1, 2025, to provide for patent term adjustment to account for delays in the processing of patent applications. Unlike the U.S., patent term adjustment is not automatically granted by the Patent Office. Rather, patentees have to proactively apply for a patent term adjustment with payment of a prescribed fee.



Copyright

Canada has acceded to the *World Intellectual Property Organization Copyright Treaty* (WCT) and the *World Intellectual Property Organization Performances and Phonograms Treaty* (WPPT). Many of the substantive provisions in the WCT and WPPT, such as the establishment of a "making available" right and the implementation of technical protection measures, were implemented in a major revision to the *Copyright Act* that came into force in November 2012. The legislation also provides a secondary liability remedy against those who "enable" digital infringements, as well as a series of new exceptions to copyright protection, including in respect of "reproduction for private purposes," "timeshifting," "technological processes," "fair dealing for the purposes of education, parody or satire" and "user-generated content." The legislation also contains safe harbours for internet intermediaries, including for hosts and internet location tool providers; however, providers should be aware these safe harbour provisions are subject to the "enablement" remedy and are also subject to a "notice and notice" regime requiring intermediaries to relay notices of claimed infringement to their customers and keep records of customers' identities.

Over recent years, there have been numerous important copyright decisions rendered by Canada's highest court. In mid-2012, the Supreme Court of Canada released five new copyright decisions. The most important themes emerging from these decisions include an acknowledgment of the concept of technological neutrality (the idea that digital and non-digital uses should receive comparable treatment under copyright law) and the continued treatment of copyright exceptions as "user rights." However, it should be noted that the decisions were made under the historical *Copyright Act* and may not apply predictably to the new provisions passed in late 2012. In November 2012, the Supreme Court issued another important copyright decision in which it prohibited the creation of copyright-like rights by anybody other than Parliament, in this instance barring a broadcast regulator from imposing a "value for signal" levy on retransmitters of copyright programming. In late 2013, the Supreme Court issued another important decision establishing the test for when copyrights are infringed by way of imitation. The test imposes a qualitative and holistic assessment of the similarities between works, which can be enhanced in certain settings by expert evidence, including for music and software copyrights. Lastly, in 2015 the Supreme Court issued a decision further clarifying the doctrine of technological neutrality as a

guiding principle in the interpretation of the *Copyright Act* and applying it to the valuation of a collective rights society royalty.

Canada is a party to the *Berne Convention* and the *Universal Copyright Convention*. Depending on the nature of the work, the owner of copyright in a work has the sole right to reproduce, perform, publish or communicate the work. The *Copyright Act* provides that copyright arises automatically in all original literary, artistic, dramatic or musical works. The *Copyright Act* provides that registration is permissive rather than mandatory. However, registration does raise certain presumptions in favour of the registered owner that are useful in the context of litigation. In general, copyright lasts for the life of the author plus 50 years. Since 1993, computer programs have been expressly protected, under statute, as literary works.

The Canadian government has also recently passed amendments to the *Copyright Act*, *Trademarks Act* and *Customs Act* that create significant anti-counterfeiting remedies tying to infringements of copyright or trademarks. These amendments permit copyright holders and owners of registered trademarks to submit a “request for assistance” to the Canada Border Services Agency. Through this system, rights holders may request that border officers detain commercial shipments suspected of containing counterfeit or pirated goods, thus enabling the rights holder to begin civil proceedings in court. The Canadian Parliament also passed amendments to the collective licensing regime under the *Copyright Act* to encourage more timely decisions in the tariff setting.

Trademarks

The *Trademarks Act* protects interests in words, symbols, designs, slogans or a combination of these to identify the source of wares or services. At present, rights in a trademark are created through use in Canada (or in the case of foreign owners, by use abroad and eventual registration in their home country). It is possible to reserve rights by filing based on an intent to use a trademark in Canada. Registration is permissive and not mandatory. Registration does, however, give the registrant the exclusive right to use the mark throughout Canada and facilitates enforcement. Without a registration, an owner’s rights are limited to the geographic area where the mark has been used. If the trademark owner intends to license the mark for use by others, even by a subsidiary company, proper control over its use by the licensee is essential for proper protection. While a trademark endures for as long as the owner uses it to identify his or her wares or services, registrations can be attacked on the basis of non-use or invalid

registration. The first term of a registration is for 10 years and is renewable for successive 10-year terms on payment of a renewal fee.

On June 17, 2019, various amendments to the *Trademarks Act* came into force to align Canada's trademark regime with international standards set out in the *Singapore Treaty*, the *Madrid Protocol* and the *Nice Agreement*. These amendments expand trademark protection to include a broader array of novel "signs," namely letters, colours, holograms, sounds, scents, tastes and textures. The amendments effectively remove the requirement for an applicant to have made "use" of a trademark in Canada or elsewhere before obtaining a registration. While the amendments have removed the requirement of "use" as a prerequisite for trademark registration, the *Trademarks Act* now includes provisions enabling cancellation of applications or expungement of registrations that were made in bad faith (e.g., by trademark squatters).

With respect to prosecution of trademark applications, divisional applications are now available under the amended *Trademarks Act*. For instance, where certain goods or services have been objected to by an examiner or have been opposed by a third party, the objected to or opposed goods and services can be "carved" out and allocated to a divisional application. In this manner, the remaining goods and services of the original trademark application, which are not subject to objection or opposition, can proceed separately to registration. When a trademark that is the subject of an application that has been previously divided proceeds to registration, it may be merged with other registrations of the trademark stemming from the same original application, provided the trademarks in question are the same and are registered to the same owner. The amendments also implemented the Nice classification system in respect of the description of goods and services in Canadian applications. Under the new regime, trademark application filing fees charged by CIPO are now calculated on a per-class basis at C$330 for the first class and C$100 for each additional class. Renewal fees charged by CIPO are also calculated on a per-class basis, set at C$400 for the first class and C$125 for each additional class.

Pursuant to Canada's ratification of the CETA, the *Trademarks Act* now provides significant "geographical indication" rights for agricultural foods and products. These rights may impede the use or registration of similarly named products in the Canadian marketplace.

Domain Names

The internet's domain name system and the internet-based practice of meta-tagging present the intellectual property system and especially trademark law with some interesting challenges. The conflict between the registered trademark system and a domain names registry is the result of domain name registrations following a "first-come, first-served" policy, without an initial, independent review of whether the name being registered is another person's registered trademark. At the same time, a domain name in some respects is more powerful than a trademark, as there can only be one company name registered for each top-level domain.

To obtain a Canadian ".ca" registration, a would-be registrant must meet certain Canadian-presence requirements. These present certain challenges for foreign entities that do not wish to incorporate in Canada.

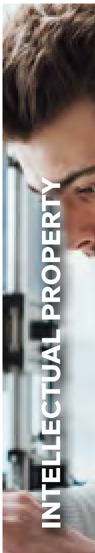
While the ownership of a registered Canadian trademark suffices to meet the requirement, the owner may reserve only those domain names that consist of or include the exact word component of that registered trademark.

In Canada, some trademark owners have successfully used the doctrine of "passing off" in combating so-called "cybersquatters." In other cases, they have argued trademark infringement under the *Trademarks Act*. To gain control of a domain name, it might also be possible to argue "depreciation of goodwill" under s.22 of the *Trademarks Act*, as well as misappropriation of personality rights.

The Canadian Internet Registration Authority (CIRA) Domain Name Dispute Resolution Policy (CDRP) is an online domain name dispute resolution process for the ".ca" domain name community. One- or three-member arbitration panels consider written arguments and render decisions on an expedited basis. Among other features, the CDRP permits a panel to award costs of up to C$5,000 against a complainant found guilty of reverse domain name hijacking.

Industrial Designs

A Canadian industrial design protects the features of shape, configuration, pattern or ornament or any combination of the foregoing in a finished article. Any of the foregoing aspects can be protected as long as it is novel within the meaning of the *Industrial Design Act*. In Canada, an applicant has 12 months to file an industrial design application covering a given ornamental



or visual feature from the date of its first public disclosure. Once granted, a Canadian industrial design registration gives the proprietor an exclusive right in relation to the design in Canada. The term of protection lasts for a period of 10 years from the date of registration in Canada or 15 years from the filing date of application, whichever is later, provided that maintenance fees are paid at the prescribed times.

On November 5, 2018, amendments to Canada's industrial design legislation came into force, which enabled Canada to accede to the *Hague Agreement Concerning the International Registration of Industrial Designs* (the Hague System) and modernize Canada's industrial design regime. The Hague System enables applicants to designate multiple countries, including Canada, for which industrial design protection is desired through a single international application. The modernization amendments provide more flexibility for applicants of industrial design registrations including the option to file divisional applications for any design that was originally disclosed, and relaxed rules in respect of the formalities associated with an application.

Other Intellectual Property

Patents, copyrights, trademarks and domain names represent some of the most common types of intellectual property. However, in today's economy, intellectual property protection takes many additional forms. The common law protects against the misappropriation of trade secrets, personality rights and passing off, among other things. It also protects privacy and personality rights to some degree. A broad range of particular rights and obligations also arise under more specific statutes, such as the *Integrated Circuit Topography Act*, the *Personal Information Protection and Electronic Documents Act*, the *Plant Breeders' Rights Act*, the *Competition Act*, the *Public Servants Inventions Act* and the *Status of the Artist Act*.

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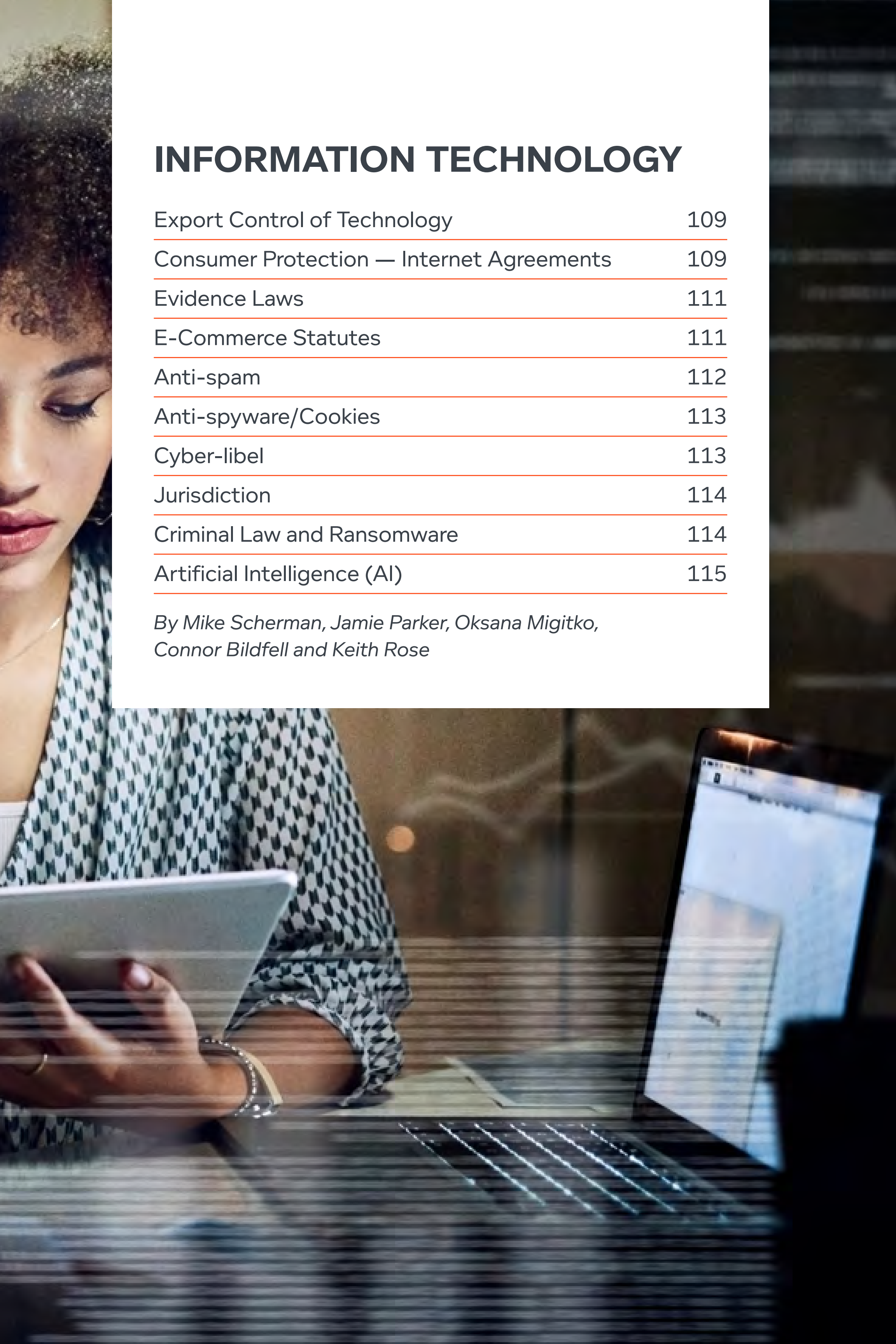

INFORMATION TECHNOLOGY

By Mike Scherman, Jamie Parker, Oksana Migitko, Connor Bildfell and Keith Rose

INFORMATION TECHNOLOGY

Export Control of Technology

In Canada, the control of exports in technology falls within the mandate of the federal government. Export of certain hardware, software, and technology may be controlled by means of the *Export and Import Permits Act* (EIPA). These controls apply not just to physical shipments, but also to transfers by intangible means, including through the provision of services or training, server upload, downloads or access from abroad, other electronic file transfers, emails, faxes, telephone conversations, teleconferencing, and face-to-face meetings. Further, restrictions on export or transfer of certain goods, software, and technology are imposed under the sanctions laws, including the *United Nations Act* and the *Special Economic Measures Act*. In some cases, economic sanctions may overlap with export controls, however, they generally apply more broadly, including in circumstances where there is no export or transfer of restricted goods, software, or technology from Canada.

Established under the EIPA, the Export Control List (ECL) identifies those goods, software, and technology, including high-tech items, that may not be exported or otherwise transferred from Canada by tangible or intangible means without first obtaining an export permit, subject to exemptions for certain destination countries. The ECL is not product specific and instead provides a set of technical specifications that are technology-neutral for the most part and are functional in their description. Currently, the ECL contains controls pertaining to items with cryptographic functionality, intrusion software, items for defeating, weakening or bypassing information security, and surveillance items for monitoring or analysis by law enforcement of content of communications or metadata. Software generally available to the public is not usually restricted. Software and other items having cryptographic security features are generally covered by export controls, subject to certain limited mass-market and public-domain exceptions, unless the cryptography employs very low-key lengths. In addition, all U.S.-origin technology that is to be transferred to a destination other than the U.S. is subject to export controls.

Consumer Protection — Internet Agreements

Various legislative initiatives have provided more legal certainty to doing business online. In Ontario, for example, the *Consumer Protection*

Act, 2002 (CPA) includes provisions germane to online commerce, where a large number of Canadian consumers buy and sell goods and services, though they apply generally outside e-commerce as well. See **Manufacture and Sale of Consumer Goods — Consumer Protection**.

Suppliers are deemed to warrant, for example, that services supplied under a consumer agreement be of "a reasonably acceptable quality." The CPA also extends the implied warranties in the *Sale of Goods Act* to goods that are leased or traded. Another important provision invalidates any requirement in a consumer contract compelling disputes to be submitted to arbitration, which some merchants use to try to avoid a class action scenario. Further, the CPA requires the merchant to provide the consumer with a fairly extensive list of disclosure information before concluding an internet agreement in a manner that is "clear, comprehensible and prominent," as well as "accessible." In addition, the merchant must provide the consumer with an express opportunity to accept or decline, and correct errors in, the internet agreement immediately before entering into it and must provide a copy of the internet agreement to the consumer within 15 days after the consumer enters into that agreement. Finally, the CPA sets out rules for prepaid cards such as gift cards, which comprise a growing segment of the consumer economy, especially online. These rules cover a number of requirements and limitations on issuers, such as whether a gift card can have an expiration date or whether the issuer can charge the consumer any fees, among other things. Similar provisions that regulate internet agreements and prepaid cards have been adopted in the majority of Canadian provinces.

Notably, consumer protection laws are currently in flux and businesses should be aware of the changing consumer protection landscape in Canada. For example, Ontario is looking at significantly changing the CPA with changes to contract disclosure and consent requirements and prohibiting certain contract terms,[1] while Québec proposed legislation on June 1, 2023 that amends its consumer protection rules to prohibit the sale of goods with planned obsolescence and to introduce a legal warranty of good working order for certain commonly used new goods.[2]

1 https://www.mccarthy.ca/en/insights/blogs/consumer-markets-perspectives/ontario-issues-consultation-paper-consumer-protection-legislation.

2 https://www.mccarthy.ca/en/insights/blogs/consumer-markets-perspectives/government-proposes-changes-consumer-protection-act-ban-planned-obsolescence.

Evidence Laws

Most jurisdictions in Canada have adopted rules of evidence that specifically address electronic documents. These statutes generally require the best-evidence rule to be satisfied in respect of electronic documents, by proof of the integrity of the electronic documents system by which the documents were recorded or preserved. These provisions also allow the integrity of the electronic documents system to be inferred from evidence that the underlying electronic device was operating properly. In short, these amendments support the admissibility of electronic documents, while still permitting a party to challenge the reliability of the computer system or network that produced the documents.

In the digital era, strict and literal compliance with litigation discovery rules, such as Rule 30 of the *Rules of Civil Procedure* (Ontario), would often prove expensive, overwhelming, and in large measure unhelpful to litigants. Therefore, judges in Canada are increasingly receptive to having litigants follow e-discovery guidelines. These guidelines may require, for example, that litigants consider e-discovery issues and, among other things, circumscribe the scope of e-discovery in order to comply with Rule 30. See **Dispute Resolution — Electronic Discovery**. In addition, the COVID-19 pandemic has accelerated the adoption and use of new technologies in courts across Canada. Many Canadian courts have continued to mandate or encourage that all litigation documents be filed electronically with hyperlinks to relevant authorities and evidence.

E-Commerce Statutes

The Canadian provinces have adopted electronic commerce statutes that address a variety of issues that arise in doing business electronically, such as the validity of using electronic messages to meet the writing requirements for legal documents. Ontario's *Electronic Commerce Act*, for example, provides that the legal requirement for a document to be in writing is satisfied by a document that is in electronic form — such as email — if it is accessible so as to be usable for subsequent reference. The provincial electronic commerce statutes also stipulate that one can satisfy any legal requirement that a document be signed by an electronic signature. The definition of "electronic signature" is very broad and encompasses any electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document. The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) is somewhat narrower and focuses only on “secure electronic signatures,” which is currently taken by the government to mean, essentially, an authentication process based on public key type encryption.

In addition to writing and signature rules, most provincial electronic commerce statutes provide that an offer, an acceptance or any other matter material to the formation or operation of a contract may be expressed by electronic information or by an act intended to result in electronic communication, such as touching or clicking an appropriate icon or other place on a computer screen, or even by speaking. These rules are useful because they confirm that contracts made over the internet will not be unenforceable simply because they were concluded electronically. There is jurisprudence in Canada supporting the enforceability of “express-click consent” agreements. Where a user is not required to click “I agree” expressly, but rather where the terms say, for example, that using the website denotes consent to the terms, there is less certainty as to enforceability.

Anti-spam

Canada’s *Anti-Spam Legislation* (CASL) is widely considered to be one of the most stringent anti-spam laws in the world. The legislation implements a broad range of requirements intended to reduce spam, identity theft, phishing and spyware. Unlike the U.S. *CAN-SPAM Act*, which allows businesses to send commercial electronic messages to individuals without prior consent provided the message contains a valid unsubscribe mechanism, CASL requires businesses to obtain valid consent prior to sending even the first commercial message to intended recipients. Violations of CASL may be subject to administrative monetary penalties of up to C$1 million for individuals and C$10 million for other offenders. Since coming into effect, the Canadian Radio-television and Telecommunications Commission (CRTC), which is responsible for enforcing CASL, has received numerous complaints from Canadians; although it has rendered few enforcement decisions thus far. Notably, in at least one instance, the CRTC has held an individual liable under CASL for violations committed by a corporation. In April 2019, the CRTC imposed an administrative monetary penalty (AMP) of $100,000 on a director of a corporation in relation to commercial electronic messages sent to recipients in Canada. In coming to this decision, the CRTC assessed the director's ability to pay, his experience with email distribution platforms, and the importance of this method of marketing to his business. The CRTC emphasized that the purpose of a penalty is to promote compliance with CASL and imposed the $100,000 fine to ensure this specific director would comply with CASL in any of his future endeavours.

Anti-spyware/Cookies

Under s. 8 of CASL, businesses normally require consent if they utilize programs that install software or other programs on a user's computer system. CASL mandates that a request for express consent must state the purpose for why consent is sought and the function of the computer program, the name of the entity seeking consent, and the mailing address and telephone number or email address for the entity that is seeking consent. However, for certain types of programs such as cookies, you are considered to already have express consent to save information from users without a request as long the user's conduct made it reasonable to believe they consented to the program's installation. For example, you are not considered to have consent to install cookies on a user's computer system, if that user disables them in their browser.[3]

It should be noted that as of September 22, 2023 under Québec's amended privacy law, technologies that collect personal information and that allow an individual to be identified, located or profiled must be deactivated as the default option, and the individual must be notified of the use of such technology and the means available to activate the functions that allow them to be identified, located or profiled.

Cyber-libel

Cyber-libel is publishing information that harms another's reputation through a computer system without lawful excuse. Recent Canadian court decisions have awarded significant monetary awards to plaintiffs who were libelled by defendants sending defamatory emails and making other similar online postings about plaintiffs. Cyber-libel can come in a various forms. In February 2021, the Ontario Superior Court of Justice even awarded a novel remedy for the "tort of internet harassment," making it the first common law court outside of the U.S. to do so.[4]

3 Ibid.
4 https://www.mccarthy.ca/en/insights/blogs/techlex/tort-internet-harassment-new-tort-extraordinary-remedy.

The case involved the dissemination of spurious and damaging accusations posted online by the defendant about the plaintiff. Because the court concluded that previously recognized torts such as defamation, intrusion upon seclusion (invasion of privacy), and intentional infliction of mental suffering were inadequate for the facts of the case, it recognized the tort of internet harassment.[5]

Further cyber-libel case law is also developing to minimize potential liability of responsible hosts of online discussion forums. Generally, an internet host will be treated as a non-publisher (passive instrument) until a potential plaintiff provides notice that they were libelled on the host's site. If the host fails to remove the content after notice, the court may decide that the host is liable by omission.[6]

Jurisdiction

In the criminal, quasi-criminal and regulatory arenas, Canadian courts and regulators seem to have little hesitation assuming jurisdiction over foreign-originated internet-related conduct they view as harmful to the public good, so long as there is a real and substantial connection to the court's or regulator's own jurisdiction.

Organizations must be transparent about their personal information handling practices. This includes advising customers that their personal information may be sent to another jurisdiction for processing, and that while the information is in another jurisdiction, it may be accessed by the courts, law enforcement, and national security authorities. Additionally, transfers of personal information outside Québec (including to another province) require additional obligations, such as assessments of privacy-related factors prior to transfer.

Criminal Law and Ransomware

In general, the Canadian government has made useful strides in combating computer crime by continuously amending the *Criminal Code* over the past 20 years to keep pace with perpetrators of computer-related crime. However, the internet and other computer-based technologies and business practices raise a number of novel questions under these amendments, as well as the older provisions of

5 https://www.canlii.org/en/on/onsc/doc/2021/2021onsc670/2021onsc670.html?resultIndex=1#document at para 171.
6 Emily B Laidlaw and Hilary Young, Internet Intermediary Liability in Defamation, 2019 56-1 Osgoode Hall Law Journal 112, 2019 CanLIIDocs 3965 at page 122, https://canlii.ca/t/sqlp.

the *Criminal Code* of Canada, highlighting (among other challenges) the difficulty in enforcing a national criminal law in an increasingly global technology environment. As technology evolves, the applicability of the *Criminal Code of Canada* to certain harmful behaviour remains in question.

The Canadian Centre for Cyber Security leads the Government's response to cybersecurity and lists ransomware as one of the most common forms of cyber attacks in Canada.[7] Ransomware is a type of malicious software used by cyber criminals to infect a device and hold its files and data for ransom. Once a computer or network is infected with ransomware, the software is capable of restricting access to the system or encrypting data from it.

The idea that cyberattacks only target "businesses of data" with ransomware is incorrect. All companies have data in their systems and cyber criminals have begun to target non-data businesses as well.[8] Consequently, it is important to properly manage the risk of ransomware by ensuring the proper precautionary steps are taken before an incident occurs. Businesses can be proactive by establishing a strong cybersecurity framework composed of organizational resources that can assess and mitigate cybersecurity risks such as ransomware.[9] Proper risk management also includes formulating cybersecurity response plans to the occurrence of a ransomware attack. The plan should address specific concerns such as the decision to pay the ransom or not and delineating a point in time where it might be necessary to involve external counsel and consultants.[10]

Artificial Intelligence (AI)

AI is actively changing the way business is conducted in Canada and around the world. AI encompasses a wide range of technologies, from chatbots and decision-making tools to software that generates entire documents, pictures and other content. Although provincial and federal governments are considering and developing AI regulations, only Québec (as of September 22, 2023) has legislation in force that directly addresses AI, and in that case only to the limited extent of requiring

7 https://cyber.gc.ca/en/ransomware-dont-get-locked-out.
8 https://www.mccarthy.ca/en/insights/blogs/techlex/emerging-developments-ransomware.
9 https://www.mccarthy.ca/en/insights/blogs/techlex/ransomware-avoidance-and-response.
10 Ibid.

organizations to make certain disclosures in connection with decisions they make that are based exclusively on automated processing of an individual's personal information.

The Federal Government has proposed the *Artificial Intelligence and Data Act* (AIDA) to regulate the design, development and use of AI in the private sector,[11] which is expected to come into force no sooner than 2025.[12] AIDA leaves many details to be set out in future regulations, and consultations with stakeholders during that time may change AIDA significantly from its current state. As proposed, among other obligations, AIDA will impose significant compliance obligations on those responsible for "high-impact" artificial intelligence systems (which are yet to be defined) and gives the Minister of Innovation, Science and Economic Development broad powers to enforce violations of AIDA, including maximum fines of the greater of C$10 million or 3% of gross global revenue. While the ultimate form and effect of AIDA is difficult to predict, the AI space will continue be a significant target for regulation and will likely have a substantial impact on the way that many organizations conduct their business in the near future.

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12 https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document.

LANGUAGE

By Véronique Wattiez Larose, Caroline-Ariane Bernier and Jessica Cytryn

LANGUAGE

Language rules in most of Canada apply primarily to government institutions, not private businesses. Canada's Constitution grants English and French equal status in Canada's Parliament and federal courts. Every law must be published in both English and French in some provinces, including Québec. The federal *Official Languages Act*, given additional profile by the *Canadian Charter of Rights and Freedoms*, requires that all federal institutions provide services in either language wherever there is demand for it, or wherever the travelling public is served. Public education is available in either official language, where numbers warrant.

CANADA'S CONSTITUTION GRANTS ENGLISH AND FRENCH EQUAL STATUS IN CANADA'S PARLIAMENT AND FEDERAL COURTS.

Outside Québec

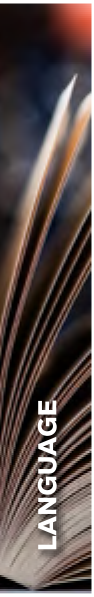
Outside Québec, the main exception to this focus on the public sector is consumer packaging. Regulations under the federal *Consumer Packaging & Labelling Act* identify specific information with which prepackaged consumer products sold in Canada must be labelled. That information must be set out in both English and French. Exceptions include religious, specialty-market and test products, and language-sensitive products, such as books and greeting cards. Products that do not meet the guidelines established by law may be seized and potentially destroyed by federal authorities.

Although Canada is bilingual at the federal level, other governments in Canada may apply their own language policies to matters within their jurisdiction. New Brunswick and the three northern territories are officially bilingual. Several provinces have adopted legislation to ensure that public services are available in French where warranted; but only Québec's language legislation regulates how businesses operate.

Inside Québec

Québec's *Charter of the French Language* (Charter) affirms French as that province's official language, the only language of the Québec nation and one of the foundations of its identity and distinct culture. The Charter grants French-language rights to everyone in Québec, both as workers and as consumers of goods and services. Anyone who carries on activities in Québec is therefore subject to rules about how they interact with the public and how they operate internally inside the province.

On June 1, 2022, significant amendments to the Charter, introduced by Bill 96, An *Act Respecting French, the Official and Common Language of Québec* came into force in Québec. These amendments affect both the public and private sector. Bill 96 aims to clarify and reinforce the provisions of the Charter, introduce new requirements and restrictions, and strengthen the role of the Office québécois de la langue française (OQLF), the governmental body responsible for ensuring compliance with the Charter. Some provisions come into force gradually over a period of three years. Some amendments to the *Regulation respecting the language of commerce and business* (the Regulation) are also to be expected.



Right to be Informed and Served in French

The Charter provides for a consumer's right to be informed and served in French, but this requirement also extends to non-consumer clients and agencies of the civil administration by requiring businesses to offer goods and services in French. This obligation is further broken down through various specific obligations of how businesses and their customers interact.

> RULES ABOUT HOW BUSINESSES COMMUNICATE IN QUÉBEC'S MARKETPLACE DIFFER ACCORDING TO WHETHER THE COMMUNICATION IS IN A PUBLIC OR PRIVATE PLACE.

Every inscription on a product on its container or on its wrapping — or on a document or object supplied with it, including the directions for use and the warranty certificates — must be drafted in French. The French inscription may be accompanied with a translation or translations, but no inscription in another language may be given greater prominence than that in French or be available on more favourable terms. Pursuant to the regulation, certain terms are allowed to appear in English only, such as trademarks. While this exception is currently available to trademarks that are "recognized" under Canadian trademark law (arguably including both trademarks for which an application is pending and common law trademarks), Bill 96 has narrowed the existing trademark exception, and starting on June 1, 2025, it will only be available for registered trademarks, provided that no corresponding French version appears in the Canadian Trademarks

Database. Furthermore, from that same date, if a generic term or a description of the product is included in the mark, then that word will also need to appear in French on the product or on a medium that is permanently attached to it.

In the case of software products, if a French-language version of the software exists and has been made commercially available, then non-French versions may be sold in Québec only if a functionally equivalent French-language version is simultaneously made available in Québec on terms and conditions that are equally attractive to those applicable to the non-French version.

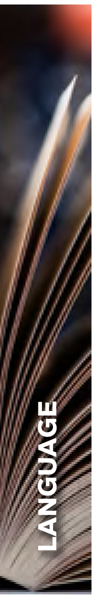
Even though the products may be manufactured or developed outside Québec, anyone who distributes, sells retail, rents, offers for sale or rental or otherwise markets — for consideration or free of charge, or possesses for such purposes — a non-compliant product in Québec may be subject to a non-compliance order, and eventually a fine, under the Charter.

Concerning marketing documents and communications, catalogues, brochures, folders, commercial directories and any similar publications have to be in French, and such a document may not be made available to the public in a language other than French if the French version is not available on terms that are at least as favourable. This rule applies to websites and social media as well.

Public signage is also subject to particular linguistic requirements. As a rule, public signs, posters and commercial advertising may include other languages, but the French text must predominate to the extent provided for in the Regulation (approximately twice as big). Similarly to the exception available to products, a trademark recognized under Canadian trademark legislation may appear on public signs and posters exclusively in a language other than French, as long as the French version is not registered. This exception is also being narrowed by Bill 96, and starting on June 1, 2025, it will only be available to registered trademarks.

That said, if an English-language-only trademark appears in public signs and posters displayed outside immovable property, a sufficient presence of French is required (on June 1, 2025, this threshold will be increased to French predominance, i.e. having the French subject matter be two times the size of the trademark). These requirements can be achieved by having one of the following three elements in French: (i) a generic term or a description of the products or services concerned; (ii) a slogan; or (iii) any other term or indication favouring the display of information pertaining to the products or services to the benefit of consumers or persons frequenting the site. This requirement is intended to address concerns expressed by certain francophone consumers in Québec to the effect that English-language trademarks were dominating the urban commercial landscape in some cities.

These rules may differ according to whether the communication is in a public or private place. Billboards and signs visible from a public highway, on a public transport vehicle, or in a bus shelter must be exclusively in French.



Lastly, standard form contracts (including website terms of use and privacy policies) must now be presented in French to the adhering party before that party can agree to sign the English-only version of same. This rule does not apply to contracts that are negotiated between the contracting parties, nor to contracts used in relations outside of Québec.

Language Obligations for Employers[1]

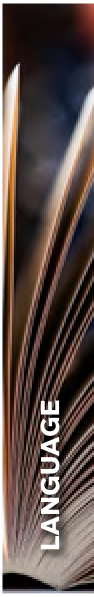
Employers must ensure that the workers' right to carry on their activities in French is respected and that the work environment is free from discrimination or harassment related to the use of French or from claiming a right arising from the Charter. An employee can file a complaint with the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) if an employer fails to comply with its obligations.

Offers of employment, employment agreements and promotion letters must be provided in French first and it is only after the candidate or employee has examined the French version that the candidate or employee may elect to be bound by an English version. All other documentation relating to conditions of employment, including documentation relating to group benefits and employer policies, as well as training documents, must be drafted in French or, if drafted in another language, must be made available in French on terms that are at least as favourable. An employer advertising a job offer in a language other than French must ensure that the non-French job offer is simultaneously advertised with the French

1 https://www.mccarthy.ca/en/insights/blogs/canadian-employer-advisor/Québecs-bill-96-impacts-employers; https://www.mccarthy.ca/en/insights/blogs/consumer-markets-perspectives/Québecs-bill-96-amending-french-language-legislation-how-will-your-business-be-affected.

offer, using transmission means of the same nature, and that such job offer reaches a target audience of a proportionally comparable size. Moreover, the knowledge of a language other than French is permitted only if the employer first took all reasonable means to avoid imposing such a requirement, and the reasons for the requirement must be stated in the job offer.

Bill 96 has also introduced the requirement that written communications to employees from their employer (i.e., top down and not peer-to-peer communications) be in French, unless the employee requests that they be in English. While verbal communications are not explicitly addressed by the Charter, it is recommended that employers take particular care in ensuring that French speaking employees feel that their right to work in French is respected and that they are not disadvantaged vis-à-vis other employees as a result of such verbal communications being in English only.



Francization

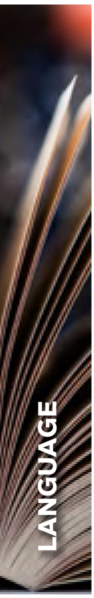
Once businesses in Québec have had more than 50 employees for a period of six months (this threshold is being lowered to 25 employees on June 1, 2025), they must register with the OQLF. They are also required, within three months of receiving their certificate of registration, to transmit an analysis of its linguistic situation to the OQLF. If the OQLF considers, after examining the analysis of the business's linguistic situation, that the use of French is generalized at all levels of the enterprise according to the parameters of the Charter, the OQLF issues a francization certificate; if not, the business must adopt a francization program to achieve that goal. Obligations in respect of francization depends on the number of employees in Québec in the business, and it may require setting up a francization committee that monitors the use of French in the workplace. Bill 96 also created an administrative unit, "Francisation Québec," responsible for providing French language learning services to persons who are unable to communicate in French and who are employed by a business with fewer than five employees.

Interacting with the Québec government

With some exceptions, written communications of business operators in Québec with the civil administration must be in French. Moreover, all documents entered into the civil administration of Québec, such as contracts, and also documents sent in the context of a contract or in view of its conclusion, must be written exclusively in French. Similar to the rule that already applies, exceptions may be raised depending on whether the business operates in Québec or not, thus allowing documents to be drafted in another language.

Non-compliance

Non-compliance of the Charter requirements may result in fines, as well as the potential suspension or withdrawal of the francization certificate (which is often a requirement in public procurement contexts) in cases of repeated contraventions of the Charter.



Moreover, Bill 96 allows for a civil action to be brought by individuals who feel the rights under the Charter have been violated. Lastly, the provisions of a contract, decision or other act that cause injury by contravening the provisions of the Charter, may be annulled on the application of the person who suffers the injury.

The fines for non-compliance with the Charter may range from C$3,000 to C$30,000 for businesses. It provides for the doubling of fines for a second offence and tripling for a subsequent offence and considers each day an offence persists as a separate offence. Finally, Bill 96 gives the OQLF the ability to request an injunction to force compliance with the requirements of the Charter, or a court order for the removal or destruction of posters, signs or advertisements that contravene the Charter, at the expense of the offending business.

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BUSINESS IMMIGRATION

By Stéphane Duval and Shefali Tanna

BUSINESS IMMIGRATION

Introduction

Business immigration and global mobility have become important factors to the growth of Canada and the Canadian economy with the federal government announcing ambitious plans to welcome more than 500,000 immigrants in 2025, steadily increasing by 50,000 immigrants per year over the next three years. This, combined with a recognized shortage of domestic skill sets, means more companies are relying on temporary foreign workers to address labour and/or skill shortages.

Canadian immigration law is made up of federal and provincial laws, associated regulations and ministerial instructions. Collectively, it governs the ability of individuals who are neither Canadian citizens nor permanent residents to be lawfully admitted to Canada either to visit, study, work or settle permanently.

The *Immigration and Refugee Protection Regulations* (Regulations) imposes a rigorous compliance regime that is designed to ensure Canadian employers respect the wage and working conditions of foreign nationals and impose serious penalties (including a period of ineligibility for hiring foreign nationals and penal charges) for non-compliance. Failure to respect any obligations could lead to serious consequences for a company, its directors and officers.

The *Immigration and Refugee Protection Act* (Act) sets out requirements for admission to Canada as an immigrant; refugees protection; enforcement and rights to appeal.

Working in Canada

As a general principle, any foreign national who is neither a Canadian citizen nor a permanent resident of Canada cannot work in Canada unless authorized to do so. For Canadian immigration purposes, work is defined as an *activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market*.[1]

Determining whether there is a payment of a salary or commission in Canada is often a simple exercise; however, the absence of payment of a

1 *Immigration and Refugee Protection Regulations* (SOR /2002-227), s. 1(1).

salary does not in itself void the requirement of a work permit. The second prong of the test: determining if there will be *direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market* is more difficult. In order to make this determination, immigration officers will analyze whether the foreign national will engage in an activity where Canadian citizens or permanent residents ("Canadians") are available or if the foreign national's position will compete with Canadian jobs. If so, the foreign national will be considered to be seeking to work in Canada and the officer will then determine whether: (i) a work permit is required; or (ii) if the work in question falls into one of the categories of work for which a work permit is not required (work permit exempt).

Work That is Work Permit Exempt

Generally, foreign nationals entering Canada on business visits do not require work permits. Under Canadian immigration laws, a "business visitor" is defined as a foreign national who seeks to engage in international business activities in Canada without directly entering the Canadian labour market.[2]

In order for foreign nationals to be admitted into Canada as business visitors and benefit from any applicable work permit exemptions, they must meet the following criteria:

— There must be no intent to enter the Canadian labour market;

The foreign national is not directly entering the Canadian labour market if:

- the primary source of remuneration for the business activities is outside Canada;
- the principal place of business remains predominately outside Canada; and
- the actual place of accrual of profits remains predominately outside Canada.[3]

2 *Immigration and Refugee Protection Regulations* (SOR /2002-227), s. 187.
3 *Immigration and Refugee Protection Regulations* (SOR /2002-227), s. 187(3).

— The activity of the foreign worker must be international in scope.

Immigration, Refugees and Citizenship Canada (IRCC) offers the following extended definition of "Business Visitor" and provides a few examples: [4]

— A business visitor is someone who comes to Canada for international business activities without directly entering the Canadian labour market.

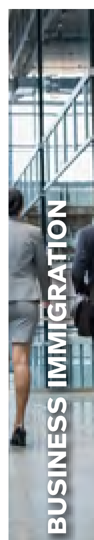
— Examples of this include someone who comes to Canada to meet people from companies doing business with their country; to observe site visits; because a Canadian company invited them for training in product use, sales, or other business transaction functions.

— They don't need a work permit to come to Canada. Business visitors must prove that their main source of income and their main place of business are outside Canada.

In addition, Canadian immigration authorities[5] have outlined specific situations in which work completed in Canada will be work permit exempt. These situations include, among others, foreign nationals travelling to Canada to:

— **Provide after sales/lease service:** Foreign nationals coming to repair and service specialized equipment, purchased or leased outside Canada, provided the service being performed was negotiated as part of the original or extended sales agreement, lease/rental agreement, warranty, or service contract are eligible for admission as a business visitor. Acceptable activities include repairing, servicing, setting up, testing and supervising work completed on commercial or industrial equipment (including computer software). Setting up services do not typically include hands-on installation performed by construction or building tradespeople.

This category includes foreign nationals who seek to enter Canada to supervise the installation of specialized machinery purchased or leased outside Canada or to supervise the dismantling of equipment or machinery purchased in Canada for relocation outside Canada.



4 https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=434&top=16.
5 Immigration, Refugees and Citizenship Canada: Operational instructions and guidelines.

- **Act as trainers and trainees:** Foreign nationals entering Canada to provide familiarization or training services to prospective users or to maintenance staff of the establishment after installation of specialized equipment purchased or leased outside Canada has been completed are considered to be business visitors.
- **Provide intra-company training and installation activities:** Foreign nationals coming to provide training or to conduct the installation of equipment for a branch or subsidiary company of their foreign employer are considered to be business visitors. The same prohibition against hands-on building and construction work as for after-sales service applies.
- **Board of Directors' meetings:** Foreign nationals attending a meeting as a member of a board of directors may enter as a business visitor.
- **Short-term work conducted by highly skilled workers:** Foreign nationals who are highly skilled and whose occupation falls in Training, Education, Experience and Responsibilities (TEER) category 0 or 1 of the National Occupational Classification (NOC) may undertake work in Canada for 15 days once every six months or 30 days once every 12 months without a work permit.
- **Researchers:** Foreign nationals coming to perform research at the invitation of a publicly funded, degree granting Canadian post-secondary institution or affiliated research institution can come to Canada to work on that project for 120 days/four months, once a year, without a work permit.

Work That Requires a Work Permit

As a general rule, work that is not work permit exempt requires a work permit under one of two programs in Canada: either the Temporary Foreign Worker Program (TFWP) or the International Mobility Program (IMP).

TFWP

Regular Program

The TFWP allows Canadian employers to hire foreign workers to fill temporary labour and skill shortages when qualified Canadian citizens or permanent residents are unavailable. This program is managed jointly by Employment and Social Development Canada (ESDC) and IRCC. Under

this program, employers must demonstrate that they have been unable to recruit Canadian citizens or permanent residents for the job.

Under the TFWP, employers must first obtain a positive Labour Market Impact Assessment (LMIA) in order for the foreign national to then apply for a work permit. An LMIA is a document issued by ESDC following a thorough assessment of Canada's labour market in order to determine whether or not Canadian citizens or permanent residents are available to undertake the type of work in question. In most cases, employers must advertise the position publicly for at least four weeks via a variety of enumerated methods so as to prove whether or not the employment of a foreign worker is likely to fill a labour shortage.

The application for an LMIA must also demonstrate that:

— the wages offered to a foreign worker are consistent with the prevailing wage rate for the occupation and region(s) where the worker will be employed and the working conditions offered to a foreign worker meet generally accepted Canadian standards;

— the employment of a foreign worker is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;

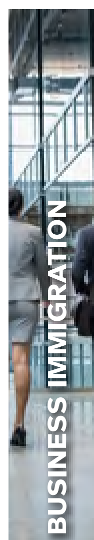
— the employment of a foreign worker is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;

— the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and

— the employment of the foreign worker is not likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.[6]

If all the conditions are met, a positive LMIA decision will be issued and the foreign national will then be able to apply for a work permit either at the port of entry upon arrival, if he/she is from a visa-exempt country, or at the Canadian visa office in his/her country of citizenship or legal residence (see below, **Applying for a Work Permit**).

6 *Immigration of Refugee Protection Regulation* (SOR /2002-227), s. 187.



Global Talent Stream

The Government of Canada recognized the importance of attracting highly skilled individuals that can contribute to the Canadian economy, especially where there is a lack of domestic talent in certain areas.

One way the Government of Canada has demonstrated its commitment to attracting the best talent is through the creation and launch of the Global Talent Stream (GTS). The GTS offers timely, responsive and predictable client-focused-service to help employers access highly skilled global talent to expand their workforce in Canada and be competitive on a global scale.

The GTS is divided into two categories:

— Category A is for employers who have been referred by a designated referral partner and who seek to hire unique and specialized talent in an area of specialization to help the employer scale up and grow;

— Category B is for employers who seek to hire highly skilled workers in a position listed on the Global Talent Occupations List, which is a list of professions that have been determined by the Government of Canada to be in demand and for which there is insufficient domestic labour supply.

To qualify for processing under the GTS, in addition to meeting the category requirements, the employer must work with ESDC to develop a Labour Market Benefits Plan that demonstrates its commitment to activities that will have lasting, positive impacts on the Canadian labour market (e.g., job creation, skills and training investments, growth of revenue, etc.). The GTS has no minimal recruitment requirement, but the employer will be asked to describe any efforts to recruit Canadians and permanent residents.

Under either category of the GTS program, employers will usually see their LMIA application processed expeditiously (i.e., on average within two weeks).

Simplified Process for Certain Occupations in Québec

For employers seeking to hire foreign nationals to work in Québec, certain occupations are eligible for processing under a facilitated LMIA process that exempts employers from conducting and demonstrating

their recruitment efforts, similar to the GTS. The list of occupations is established by region and are updated yearly. The simplified process allows employers to receive LMIAs on an accelerated basis, provided that the potential foreign national employees meet the requirements of the occupations in question.

IMP

The IMP allows employers to hire a foreign national and support an application for a work permit without first obtaining an LMIA. The IMP has various categories, which are based on: public policies, international agreements or arrangements (e.g., *Canada-United States-Mexico Agreement* (CUSMA, formerly known as NAFTA), *Comprehensive Economic and Trade Agreement* (CETA), *Canada-U.K. Trade Continuity Agreement* (Canada-U.K. TCA), *General Agreement on Trade in Services* (GATS), etc.), Canadian interests, permanent residence applicants in Canada, etc.

Some of the categories of work permit under the IMP include:

— **Intra-company transferees:** This category allows multinational companies either with operations in Canada, or those who are seeking to set up Canadian operations, to temporarily transfer qualified employees to Canada for the purpose of improving management effectiveness, expanding Canadian activities, and enhancing the competitiveness of Canadian entities. Eligible foreign nationals must be currently employed outside of Canada (by a related enterprise) for at least 12 months in the past three years and be seeking to work at a Canadian parent, subsidiary, branch, or affiliate of the foreign enterprise in an executive, senior managerial or specialized knowledge capacity.[7]

— **Professionals:** This category facilitates the issuance of a work permit to foreign nationals to occupy certain professions specifically provided for in various International Free Trade Agreements such as CUSMA, CETA, CPTPP and Canada-U.K. TCA, among others. The foreign national can apply for a Canadian work permit as long as they can prove they meet the defined requirements of the occupation and demonstrate the existence of a Canadian job offer in that occupation.

7 https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes/intra-company-transferees/canadian-interests-significant-benefit-general-requirements-r205-exemption-code-c12.html.

— **Francophone mobility:** French-speaking foreign nationals whose language of habitual use is French and who have been recruited to work in any position in any skill level outside of Québec can apply for and obtain a work permit.

— **Spouses of skilled work permit holders:** Spouses/common-law partners of foreign nationals who hold Canadian work permits that were issued for more than six months and that authorize them to work in a high-skilled occupation (TEER 0, 1, 2 or 3) can obtain open, i.e., non-employer specific, work permits valid for a concurrent duration to their spouse's permit.

— **Emergency repairs or repair personnel for out-of-warranty equipment:** In situations where a repair must be completed urgently in order to prevent the disruption of employment of Canadian citizens or permanent residents regardless of whether the equipment is under warranty — and for which specialized knowledge is required and for which there is no Canadian commercial presence by the company that manufactured the equipment being repaired — a short-term work permit can be obtained (usually 30 days or less).

— **Post-graduation work permit:** Foreign nationals in Canada who have continuously studied full time in Canada pursuant to a valid study permit and have completed a program of study that is at least eight months in duration at a designated learning institution, are eligible for an open work permit under certain conditions.

— **Reciprocal employment:** Foreign workers can take up employment in Canada when Canadian citizens and permanent residents have availed themselves to similar reciprocal opportunities abroad. Entry under reciprocal provisions should result in a neutral labour market impact.

— **International Experience Canada:** The Canadian government has signed bilateral, reciprocal agreements and made arrangements with 36 countries and territories nationalities to facilitate the movement of their youth between countries for the purpose of cultural exchange. These agreements allow foreign nationals between 18 and 30 or 35 years old (depending on the country) to obtain a work permit for a limited period of time in order to travel or work anywhere in Canada (Working Holiday Program) or for a specific employer (International Co-op Program and Young Professional Program).

— **Bridging open work permit:** Foreign nationals currently in Canada (but outside of Québec) with a valid status as a worker set to expire within four months and who have submitted an application for permanent resident status may be eligible for bridging open work permits so they may continue working and living in Canada pending the adjudication of their application.

— **Québec selection certificate holders currently in Québec:** Foreign nationals who are currently in Québec with valid status as a worker may obtain a work permit valid for up to two years with a Québec-based employer on the basis of their Québec selection certificate obtained through the Québec permanent skilled worker program.

— **Post-doctoral PhD fellows and award recipients:** Foreign nationals appointed to a time-limited position with an accompanying stipend or a salary to compensate for periods of teaching, advanced study and/or research may be issued temporary work permits. Applicants must have completed, or be expecting to complete shortly, their doctorate and be working in a field related to that in which they earned, or are earning, their PhD. Academic research award recipients who are supported by their own country or institution and invited by Canadian institutions to conduct research activities in Canada may also be eligible for a work permit under this category.

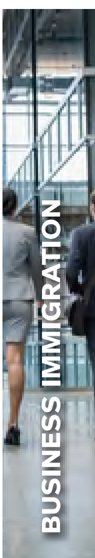
Applying for a Work Permit

The work permit can be applied for once an LMIA is issued (if required), or when the Canadian employer provides the foreign worker with the proof of submission of an offer of employment under the employer portal and proof of payment of the employer compliance fee.

With either document in hand, the foreign worker can apply for their work permit upon entry into Canada, if eligible, or at a visa office abroad, depending on their country of citizenship.

Foreign Nationals Who do not Require Visas

A foreign national who is a citizen of a visa-exempt country can apply for a work permit at the port of entry (Canadian land border or any major international airport). All visa-exempt applicants, except certain individuals, including U.S. citizens, will require an Electronic Travel Authorization (eTA) in order to travel to Canada by air.



On June 6, 2023, 13 countries were added to the eTA program. Travellers from these countries who have either held a Canadian visa in the last 10 years or who currently hold a valid United States non-immigrant visa can now apply for an eTA instead of a visa when travelling to Canada by air.

Foreign Nationals Who Require Visas

Foreign nationals who require a visa to enter Canada must apply for their work permit at a visa office abroad. This can be done electronically or on paper, in certain circumstances. While there is a general list of documents to be provided in support of an application for a work permit, each local visa office has its own specific requirements, and it is important to review them before submitting the application. A personal interview might also be required in exceptional circumstances. The application must be submitted at the visa office responsible for the foreign nationals' country of citizenship or their country of current legal residence.

Additional Considerations

Foreign nationals who have resided in certain countries for six months or more in the 12 months preceding the date of the application, or who seek to work in a job in which public health must be protected (such as health care, children, etc.), will require a medical examination prior to their admission into Canada. Medical exams must be completed by an IRCC authorized Panel Physician.

International Mobility Workers Unit

Employers seeking to hire visa-exempt foreign nationals under one of the IMP categories may seek to have their application pre-adjudicated by the International Mobility Workers Unit, an in-country service available to visa-exempt nationals not currently in Canada.

International Students

International students may be authorized to work off campus if they meet the following requirements:

— they have a specific notation on their work permit stating "may accept employment on or off campus if meeting eligibility criteria as per R186(F), (V) or (W). Must cease working if no longer meeting these criteria.;"

— they are a full time student at a designated learning institution (DLI);

— they are enrolled in a post-secondary academic, vocational or professional training program (or, if in Québec: a secondary-level vocational training program);

— their study program is at least six months long and leads to a degree, diploma or certificate;

— they have started studying; and

— they have a social insurance number (SIN).

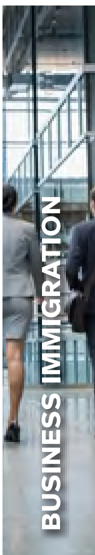
If they are a part time student, they are only authorized to work off campus if they are studying part time because they are in the last semester of their study program and don't need a full course load to complete their program and they were a full time student in their program in Canada, up until their last semester.

Generally, students are authorized to work off campus during term time up to 20 hours per week, and on a full time basis during regular breaks.

However, in July 2023, the Government of Canada expanded this work authorization. Therefore, if international students are authorized to work off campus, and if they applied for a study permit (or extension) on or before October 7, 2022, they are authorized to work off campus during term time on a full time basis until December 31, 2023 if they currently hold a valid study permit, or if their study permit has expired, but they have maintained their status and are studying at a DLI full time (or part-time if it's the final academic semester), or if they have been approved for a study permit, but haven't arrived in Canada yet. They retain their authorization to work off campus on a full time basis during regularly scheduled breaks.

There are additional situations to be considered on a case-by-case basis.

This policy allows international students to fill critical gaps in the labour market by expanding opportunities for them to gain more substantial local work experience, while continuing to pursue their studies full time.



Specific Programs

Tech Talent Strategy

The Government of Canada has developed policies designed to support the next generation of innovative industrial activities by aligning immigration tools with industrial priorities essential to supporting Canada's future prosperity.

Innovation Stream of the International Mobility Program

IRCC will create a new exemption from the LMIA process under the IMP to help high-growth employers and talented workers support Canada's innovation priorities and high-tech industries by the end of 2023.

There will be two categories:

— employer-specific work permits valid for up to five years for workers destined to work for a company identified by the Government of Canada as contributing to the country's industrial innovation goals;

— open work permits valid for up to five years for highly skilled workers in select in-demand occupations.

This new program is groundbreaking as currently the maximum period of validity of a work permit is three years. This extended work permit offers employers and foreign nationals greater certainty and stability.

Open Work Permits for H-1B Visa Holders

The second program is the streamlined process for H-1B specialty occupation visa holders and their accompanying family members in the U.S. to apply for a Canadian open work permit. This program seeks to offer a flexible and adaptive alternative to the difficulties that H-1B visa holders experience in the U.S. in extending their stay beyond six years and the long wait times, sometimes of over 10 years, required to obtain permanent residency. This program has multiple benefits: Canadian employers now have access to an expanded talent pool and foreign nationals in highly skilled roles have the opportunity to gain competitive Canadian work experience.

Approved applicants will receive an open work permit valid for up to three years and their spouses and dependants will also be eligible to apply for the required documents valid for a concurrent duration.

This is a pilot program that opened on July 16, 2023, and was closed on July 17, 2023, as the cap of 10,000 applications was reached. Only principal applicants, and not their accompanying family members, were counted toward the application cap, demonstrating the popularity of the program. Given this, another similar program may be launched again in the future.

Country-Specific Programs

Canada regularly expresses support for foreign nationals residing in countries affected by natural disasters or political instability and/or changes. This has been evidenced by programs initiated to support Afghan Citizens fleeing the Taliban, programs for Hong Kong nationals and individuals affected by the civil disruptions in Sudan among others.

These programs often facilitate the issuance of Canadian work authorizations to foreign nationals, allowing them to temporarily settle in Canada and continue their lives until either the situation normalizes in their country of nationality, or they apply to stabilize their status in Canada.

For employers, this means that there is a constant flow of foreign nationals with unique expertise in industries that may not be as well developed, or well staffed in Canada, entering the Canadian labour market, for the benefit of all.

Employer Obligations Toward Foreign Nationals

Canadian employers of foreign nationals are expected to meet rigorous compliance requirements regarding the foreign workers in their employ. It is essential that Canadian employers:

— **Hire a foreign worker with the requisite authorization:** The law prohibits any employer from hiring a foreign national who does not possess the requisite work authorization. It also places the onus on the employer to verify the status of every foreign national that it employs. In other words, should the employer fail to exercise due diligence in determining whether employment is authorized, the employer will be deemed to have known that it is not authorized. It is critical to verify the status of any foreign worker before making an offer of employment.

— **Ensure ongoing compliance with the foreign national's declared terms of employment:** When hiring a foreign worker, Canadian employers set out the terms of employment both to the foreign worker and to the Government of Canada. These must be respected in precisely the same way as they would for a Canadian employee. However, in cases of foreign workers, any changes to the terms of employment — including minor changes such as an increase in salary or a change in the number of hours worked — may need to be reported to Canadian authorities prior to this change taking place (depending upon the work permit category and the delta of change). Audits of employers that currently have or have had (audits can be retroactive six years) foreign workers in their employ are routine occurrences.

— **Avoid any form of misrepresentation:** Canadian law prohibits any person, including an employer, from communicating either directly or indirectly, information that is false or misleading, or making any erroneous representation that could lead to Canadian immigration law or regulations being administered incorrectly. Therefore, it is important that any statement, form, or document produced by an employer is accurate and true, including but not limited to the offer of employment, any forms, or communications exchanged with officers.

— **Ensure proper contract terms:** Conclude employment contracts with foreign nationals setting out the terms of employment prior to the submission of an offer of employment in the employer portal (IMP) or, on or before the first day of work of the foreign national that is during the period of employment for which the work permit is issued to them if the work permit is obtained pursuant to an LMIA.

— **Be aware of provincial and federal laws:** Comply with all federal or provincial laws that regulate the employment or recruitment of employees, including foreign nationals, in the province in which the foreign national works. The recruitment and licensing requirements vary province by province and must be assessed independently.

The consequences of non-compliance in any form on the part of the Canadian employer could be significant. Employers found non-compliant are subject to:

— warnings;

— administrative monetary penalties ranging from C$500 to C$100,000 per violation, up to a maximum of C$1 million over one year, per employer;

— a ban of one, two, five or 10 years, or permanent bans for the most serious violations from all forms of foreign worker programs;

— the publication of the employer's name and address on a public website with details of the violation(s) and/or consequence(s); and/or

— the suspension or revocation of previously issued LMIAs.

Furthermore, depending on the nature of the breach, companies, directors, and officers can also be sentenced to a fine of up to C$50,000 or C$100,000 and imprisonment for a term of up to two or five years.

Permanent Residents

Many programs currently exist for foreign workers to settle permanently in Canada. Some of these are point-based systems that factor in personal, professional, education and other qualities in addition to any time spent in Canada as a foreign worker, while other programs are based on family reunification. Additionally, as immigration is jointly managed by the federal government and provinces and territories, additional options exist at the provincial level that are tailored to the needs of each province.

Permanent residents can, like any Canadian citizen, work and live in Canada, subject to certain obligations imposed upon them, most importantly, a residency obligation. Under the current legislation, the residency obligation requires any permanent resident to be physically present in Canada for at least 730 days in any five-year period, failing which they may lose their permanent resident status. Certain exceptions to this obligation exist.

Inadmissibility

Foreign nationals can be considered criminally inadmissible to Canada for having been convicted of an offence inside or outside of Canada that constitutes an offence under Canadian law. Individuals who are inadmissible to Canada may be denied entry to the country regardless of the purpose of their trip. In certain cases, this inadmissibility can be overcome via an application for a temporary resident permit, which is granted on a discretionary basis where an urgent need to travel to Canada can be established.

In some circumstances, individuals who are inadmissible to Canada may be eligible for criminal rehabilitation, which overcomes criminal inadmissibility permanently.

Conclusion

Prior to hiring a foreign national, whether temporarily or permanently, employers should ensure they are cognizant of their rights and obligations. Employers' actions are regulated from the start of the recruitment process and remain in effect throughout the hiring process and until the time of termination. Furthermore, employers are required to maintain records of all documents relating to the recruitment, hiring, employment and termination of a foreign worker for six years from the first day of employment for which a work permit was issued. The consequences of any breach of the applicable federal and provincial laws could drastically affect both the employer and its business.

The rules and regulations governing both permanent and temporary entry to Canada are complex and ever changing. It is therefore prudent for any company having, or wishing to establish, a commercial presence in Canada to become familiar with Canadian immigration laws.

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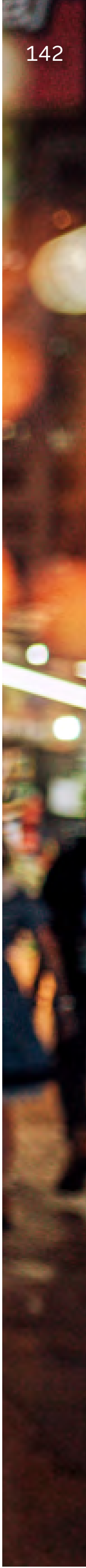
INTERNATIONAL TRADE AND INVESTMENT

By John Boscariol and Gajan Sathananthan



INTERNATIONAL TRADE AND INVESTMENT

Canada is a member of the World Trade Organization (WTO) and a party to the *Canada-United States-Mexico Agreement* (CUSMA), the *Comprehensive Economic and Trade Agreement* (CETA) with the EU, the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP) and numerous other regional trade and investment protection agreements. Through these agreements, Canadian suppliers have preferential access to markets in the Pacific Rim, the United Kingdom, the EU and the United States.

Due of the broad scope of these trade and investment agreements and their binding dispute settlement mechanisms, foreign investors establishing a business in Canada should be cognizant of Canada's obligations and the remedies available to them, particularly where they are facing discriminatory or otherwise harmful government measures.

The World Trade Organization

As a member of the WTO, Canada is subject to a broad range of obligations that impact all sectors of the Canadian economy. These obligations govern Canadian measures concerning market access for foreign goods and services, foreign investment, the procurement of goods and services by government, the protection of intellectual property rights, the implementation of sanitary and phytosanitary measures and technical standards (including environmental measures), customs procedures, the use of trade remedies, such as anti-dumping and countervailing duties and the subsidization of industry.

These WTO obligations apply to Canadian government policies, administrative and legislative measures, and even judicial action. They apply to the federal government and also in many cases to provincial and other sub-federal governments.

Canada is an active participant in the WTO's dispute settlement system, both as complainant and respondent. As a result of WTO cases brought against Canada by other countries, Canada has had to terminate or amend offending measures in numerous sectors, including automotive products, magazine publishing, pharmaceuticals, dairy products, green energy and aircraft. On the other hand, Canadian successes under the WTO dispute settlement system have increased access for Canadian companies to markets around the world.

The Canada-United States-Mexico Agreement

On July 1, 2020, CUSMA came into force and replaced the prior *North American Free Trade Agreement* (NAFTA). NAFTA, which originally came into effect on January 1, 1994, provided for the elimination of trade barriers among Canada, the United States and Mexico. Between Canada and the United States, the process of tariff elimination initiated pursuant to the *Canada-United States Free Trade Agreement* that came into effect on January 1, 1989, was continued under NAFTA. On January 1, 1998, customs duties were completely eliminated with respect to U.S.-origin products imported into Canada, with the exception of certain supply-managed goods (including dairy and poultry products). Effective January 1, 2003, virtually all customs tariffs were eliminated on trade in originating goods between Canada and Mexico. CUSMA has continued this process of tariff elimination between the parties.

While CUSMA eliminates tariff barriers among Canada, Mexico and the United States, each country continues to maintain its own tariff system for non-CUSMA countries. In this respect, CUSMA differs from a customs union arrangement of the kind that exists in the European Union, whereby the participating countries maintain a common external tariff with the rest of the world. A system of rules of origin has been implemented to define those goods entitled to preferential duty treatment under CUSMA. Goods wholly produced or obtained in Canada, Mexico or the United States, or all three countries, will qualify for preferential tariff treatment, as will goods incorporating non-CUSMA components that undergo a prescribed change in tariff classification, and that in some cases satisfy prescribed value-added tests. Some specific items, such as automobiles, have further restrictions on origin, requiring that certain wage levels be paid for labour used in constructing originating materials. Provided the CUSMA rules of origin are satisfied, investors from non-CUSMA countries may establish manufacturing plants in Canada through which non-CUSMA products and components may be further processed and exported duty-free to the United States or Mexico.

Outside of a three-year legacy investment window, which has now expired, CUSMA eliminates the NAFTA Chapter 11 obligations on Canada concerning its treatment of investors of other NAFTA countries. It also eliminates the investor-state dispute settlement (ISDS) mechanism, which permits a private investor of one NAFTA country to sue the government of another NAFTA country for loss or damage arising out of that government's breach of its investment obligations as between Canada and the other parties. However, Canada maintains similar protections and ISDS mechanisms with regard to Mexico under the CPTPP (to which both are parties).

While CUSMA contains many obligations similar to those found in WTO agreements, it is sometimes referred to as "WTO-plus," because of enhanced commitments in certain areas, including foreign investment, intellectual property protection, energy goods (such as oil and gas), financial services, telecommunications and rules of origin. CUSMA also establishes special arrangements for automotive trade, trade in textile and apparel goods and agriculture.

The Canada-European Union Comprehensive Economic and Trade Agreement

On September 21, 2017, Canada and the European Union provisionally implemented the EU-Canada CETA. The agreement is now fully in force except for a few specific provisions — most notably enforcement provisions of the ISDS protections, obligations to impose criminal sanctions on copyright violations and certain market access protections for portfolio financial services.

As one of Canada's broadest and most significant trade agreements to date, CETA significantly liberalizes trade and investment rules applicable to economic relations between the two regions. CETA addresses trade in services (including financial services), movement of professionals, government procurement (including at the provincial and municipal levels), technical barriers to trade, investment protection and ISDS and intellectual property protections (including for geographical indications and pharmaceuticals).

On the day CETA entered into force, 98% of all EU tariff lines became duty-free for Canada. Canadian exporters also benefit from clear rules of origin that take into consideration Canada's supply chains to determine which goods are considered "made in Canada" and eligible for preferential tariff treatment. Similar to NAFTA, CETA also aims to foster regulatory harmonization, co-operation and information sharing between Canadian and EU authorities in order to put in place more compatible regulatory regimes. This includes co-operation on sanitary and phytosanitary measures for food safety, animal and plant life and health. CETA also includes some sector-targeted provisions that recognize specific interests related to wines and spirits, biotechnology, forestry, raw materials, science, technology and innovation. Underscoring the agreement's co-operative objectives, CETA also promises to implement greater transparency and information sharing with respect to subsidies and trade remedies provided by governments to their respective countries' industries.

While not yet in force, CETA includes a novel mechanism for ISDS arbitration. Where a dispute arises under CETA, the parties have agreed to establish a permanent tribunal that utilizes the ISDS arbitration mechanism. The tribunal is to be comprised of 15 members: five nationals of Canada, five nationals of EU members states and five nationals of third countries — each of which must be a jurist in their home jurisdiction. Cases will be heard by panels of three tribunal members (one for each party's state and the third selected from a list of neutral members). CETA also establishes an appellate tribunal that may uphold, reverse, or modify a tribunal's award based on errors of law, manifest errors of fact, or on the basis that it has exceeded its jurisdiction.

The Comprehensive and Progressive Trans-Pacific Partnership Agreement

The CPTPP is a trade agreement among 11 Pacific Rim countries, representing a major portion of the global economy. The agreement provides significantly enhanced access to Pacific markets for Canadian business.

The agreement has been finalized and was signed by ministers of Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. It came into force in December 2018 and has been implemented by Mexico, Japan, Singapore, New Zealand, Canada, Australia and Vietnam. In July 2023, the United Kingdom signed the protocol of accession to join the CPTPP, and the agreement will enter into force once ratified by the United Kingdom and the CPTPP parties, which the U.K. expects to occur in the second half of 2024.

The CPTPP is a broad and comprehensive agreement in the mould of CETA. The CPTPP reduces trade barriers across a range of goods and services, which will, in turn, create new opportunities for businesses and consumers. The CPTPP addresses new trade issues and other contemporary challenges, such as labour and environmental issues. It reflects both tariff and non-tariff barriers to trade and investment, with the goal of facilitating the movement of people, goods, services, capital and data across borders. The agreement also includes ISDS provisions to resolve disputes between parties and investors.

Other Free Trade Agreements

In addition to CETA, CUSMA, and the agreements of the WTO, Canada has also negotiated free trade agreements with Colombia, Chile, Costa Rica, Honduras, Jordan, Korea, Israel, Panama, Peru, Ukraine and the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland).

Following Brexit, the United Kingdom is no longer covered by the terms of CETA. However, Canada has negotiated a *Trade Continuity Agreement* that preserves similar treatment for the U.K. as if it continued to be covered by CETA while it negotiates a permanent replacement with the United Kingdom. Trade between Canada and the U.K. will also become governed by the CPTPP following the pending ratification of the United Kingdom's entry into that agreement.

Canada is currently in formal negotiations regarding free trade deals with the Dominican Republic, India, Indonesia, Japan, Morocco, Singapore, the Association of Southeast Asian Nations (ASEAN), the Caribbean Community (CARICOM), among others.

Bilateral Investment Treaties

Bilateral investment treaties (BITs) between Canada and 38 countries are currently in force. These BITs govern a range of foreign investment issues, including the treatment of foreign investors and their investments, performance requirements, expropriation and compensation and government-to-government dispute settlement mechanisms.

To investors, perhaps the most important feature of these BITs is that they also contain private investor-state dispute settlement mechanisms that enable foreign investors to sue host governments, including Canada, for damages arising out of breaches of their investment treaty obligations. Foreign investors intending to establish a business in Canada are advised to determine whether their home state has a bilateral investment treaty with Canada. If so, their rights as an investor may be enhanced. Canadian-based businesses will also benefit from the BIT protections available for their foreign direct investment in developing countries.

Canada has also recently released a 2021 Model BIT which it will use for future negotiations. The provisions of the 2021 Model BIT draw heavily from the ISDS mechanisms and protections in the CPTPP and CETA. There is an enhanced focus on preserving regulatory flexibility, increasing transparency and creating a pseudo-court structure for any arbitral panel.

Canadian Free Trade Agreement

The federal government of Canada has negotiated the *Canadian Free Trade Agreement* (CFTA) with each of the governments of Canada's provinces and territories, an agreement which replaces the former interprovincial trade agreement, the *Agreement on Internal Trade* (AIT). The CFTA contains obligations pertaining to: restricting or preventing the movement of goods, services and investment across provincial boundaries; investors of a province; the government procurement of goods and services; consumer-related measures and standards; labour mobility; agricultural and food goods; alcoholic beverages; natural resources processing; communications; transportation; and environmental protection. The CFTA also provides for government-to-government and person-to-government dispute resolution.

The CFTA came into force in 2017, replacing the AIT, which had come into force in 1995 and had been updated since that time through 14 protocols of amendment.

Forced Labour and Child Labour

Since July 1, 2020, there has been a prohibition on the importation and distribution of any goods mined, manufactured or produced in whole or in part from forced labour. However, unlike in the United States, enforcement in Canada has generally been slow to date. Certain civil society organizations sought an order from the Federal Court requiring the government to presumptively prohibit goods imported from the Xinjiang region of the People's Republic of China on forced labour grounds, absent evidence to the contrary. The Federal Court held that the Canadian Border Services Agency did not have the legal authority to enact such a general presumptive ban and must instead make determinations on a case-by-case basis. This prohibition will be expanded to include goods mined, manufactured or produced in whole or in part from child labour on January 1, 2024.

On January 1, 2024, the *Fighting Against Forced Labour and Child Labour in Supply Chains Act* will also come into force. This act will implement reporting requirements related to the presence of forced and child labour in the supply chain. The act applies broadly to most entities that produce, sell or distribute goods in Canada or elsewhere, and to entities that import into Canada goods produced outside Canada. It also applies to entities that control another entity engaged in such production, sale, distribution or importation. The key obligation under the act is the annual publication of a report on diligence processes implemented by entities subject to the legislation that are aimed at "[preventing and reducing] the risk that forced labour or child labour is used at any step of the production of goods in Canada or elsewhere by the entity or of goods imported into Canada by the entity." Given the broad range of entities that are covered, businesses should carefully review these new measures to determine if these obligations apply to them and, if so, take action to prepare the initial reports that are due in May 2024.

CANADA, FOR REASONS OF BOTH DOMESTIC POLICY AND INTERNATIONAL TREATY COMMITMENTS, MAINTAINS ECONOMIC SANCTIONS AND CONTROLS ON IMPORTS, EXPORTS AND TRANSFERS OF CERTAIN GOODS AND TECHNOLOGY.

Economic Sanctions

A number of nations, entities and individuals are subject to Canadian trade embargoes under the *United Nations Act*, the *Special Economic Measures Act*, the *Justice for Victims of Foreign Corrupt Officials Act* (Sergei Magnitsky Law), the Freezing Assets of *Corrupt Foreign Officials Act* and the *Criminal Code*. Canadian sanctions of varying scope apply to activities involving the following countries or regions: Afghanistan, Burma (Myanmar), Belarus, Central African Republic, the Democratic Republic of the Congo, Haiti, Iran, Iraq, Lebanon, Libya, Mali, Moldova, Nicaragua, North Korea, the People's Republic of China, Russia, Somalia, South Sudan, Sri Lanka, Sudan, Syria, Ukraine (generally targeting the Crimea region and other Russian-occupied areas in Ukraine), Venezuela, Yemen and Zimbabwe. Canada also maintains very significant prohibitions on dealings with listed "designated persons," terrorist organizations and individuals associated with such groups.

Since the Russian invasion of Ukraine in February 2022, Canada has imposed numerous rounds of sanctions measures on Russia, Belarus and the occupied regions of Ukraine. Canada has sanctioned over 1,000 individuals and 250 entities, including many Russian banks, oligarchs and various significant government and private actors in the Russian and global economy. Additionally, in June 2022, Canada became the first G7 country to provide for the forfeiture and redistribution of assets of any person designated on its sanctions lists.

Canada's use of economic sanctions since the Russian invasion has been unprecedented in modern history, with the imposition of over 70 rounds of sanctions measures. Although many of these have focused on Russia and the occupied regions of Ukraine, recent measures have also targeted Iran, Haiti, Sri Lanka and Moldova, among others. This dramatic escalation in the use of economic sanctions has placed a strain on the governmental authorities that administer Canada's sanctions regime, and in May 2023, the Canadian Senate's Standing Committee on Foreign Affairs and International Trade proposed 19 recommendations to improve the effectiveness of Canada's sanctions regime, including supporting the creation of a specialized sanctions bureau that had previously been announced by the Canadian government.

In a number of areas, these Canadian economic sanctions measures are more onerous than those imposed by the United States, the United Kingdom, and the European Union. This makes it important to consider sanctions-related compliance on a country-by-country basis and to calibrate compliance programs accordingly.

Unlike the United States, Canada does not maintain a general trade embargo against Cuba. Indeed, an order issued under the *Foreign Extraterritorial Measures Act* makes it a criminal offence to comply with the U.S. trade embargo of Cuba and requires that the Attorney General of Canada be notified of communications received in respect of these U.S. embargo measures.

Export and Import Controls on Goods and Technology

Canada, for reasons of both domestic policy and international treaty commitments, maintains controls on imports, exports and transfers of certain goods and technology and, in the case of exports, their destination country. The federal *Export and Import Permits Act* (EIPA) controls these goods through the establishment of four lists: the Import Control List (ICL), the Export Control List (ECL), the Area Control List (ACL) and the Brokering Control List (BCL).

Goods identified on the ICL require an import permit, subject to exemptions (including for goods from certain countries of origin). These include steel products, weapons and munitions and agricultural and food products, such as turkey, beef and veal products, wheat and barley products, dairy products and eggs.

The ECL identifies those goods and technology that may not be exported or transferred from Canada without obtaining an export permit, subject to exemptions for certain destination countries. Controlled goods and technology are categorized into the following groups: dual-use items, munitions, nuclear non-proliferation items, nuclear-related dual-use goods, miscellaneous goods and technology (including all U.S.-origin goods and technology, certain medical products, forest items, agricultural and food products, prohibited weapons, nuclear-related and strategic items), missile equipment and technology, chemical and biological weapons and related technology and items controlled under the United Nations *Arms Trade Treaty*.

Canada has also implemented certain controls on “brokering” of arms and arms related technologies identified in the BCL. These restrictions control the ability of Canadians and persons in Canada to arrange or negotiate the transfer of defence items and technology between foreign countries.

Export permits must also be obtained for the export or transfer of any goods or technology, regardless of their nature, to countries listed on the ACL. The only country on the ACL is North Korea at the present time.

In addition to the EIPA, other Canadian legislation regulates import and export activity, including in respect of rough diamonds, nuclear-related goods and technology, cultural property, wildlife, food and drugs, hazardous products and environmentally sensitive items.

Defence Production Act — Controlled Goods Program

The Canadian government has established the Controlled Goods Program under the authority of the *Defence Production Act*. This program is a domestic industrial security regime for certain goods and technology that have a military application, including but not limited to items subject to the *U.S. International Traffic in Arms Regulations*. It provides for defence trade controls to regulate and control the examination, possession and transfer in Canada of controlled goods and technology.

Anyone who deals with controlled goods and technology in Canada must register with the Controlled Goods Directorate and comply with numerous employee screening, security and other requirements.

Anticorruption Legislation

The federal *Corruption of Foreign Public Officials Act* (CFPOA) makes it a criminal offence for any person to offer or pay a bribe to a foreign public official. The CFPOA prohibits Canadians from directly or indirectly (i.e., through an agent or other representative) giving, offering, or agreeing to give or offer a loan, reward, advantage, or benefit of any kind to a foreign public official in order to obtain or retain an advantage in the course of business. Canadian companies must therefore carefully scrutinize their activities abroad, including the actions of their agents and other business partners in other countries to ensure compliance with the CFPOA.

In recent years, Canadian corporate culture has been undergoing significant change in response to increased enforcement of the CFPOA by the Royal Canadian Mounted Police (RCMP) and Crown prosecutors. The widely publicized criminal penalties against Niko Resources Ltd. in 2011 and Griffiths Energy in 2013 — and ongoing RCMP investigations into the activities of a number of other Canadian companies — serve as stark warnings of the very significant costs of non-compliance. In light of this, many Canadian companies are moving quickly to design and implement anticorruption policies and procedures, as well as transactional risk mitigation strategies. Canada has also seen three recent successful prosecutions of individuals for CFPOA violations. Most notably, in 2020 a former SNC-Lavalin executive received an eight-and-a-half-year prison sentence for his role in the company providing over C$100 million in payments to government officials to secure contracts in Libya. He was also fined over C$24 million and was required to forfeit the property he had obtained with proceeds from the offence. SNC-Lavalin was also subject to a C$280 million fine pursuant to a plea agreement for charges under Canada's *Criminal Code* for these payments.

In addition, Canada has enacted sector-specific legislation to increase transparency and deter corruption for Canadian companies operating outside of its borders. For example, the *Extractive Sector Transparency Measures Act* (ESTMA) was brought into force on June 1, 2015. ESTMA requires extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments in Canada and abroad.

Similarly, the federal government has also put in place a series of integrity policies (collectively referred to as the "Integrity Regime") to ensure that the government itself conducts its business with ethical suppliers both in Canada and abroad. The Integrity Regime ranks among the world's most aggressive debarment programs for the disqualification of companies seeking to do business with the federal government. It aims to promote and enforce ethical business practices in government, ensure due process for the government's suppliers and service providers and uphold trust in the public procurement process.

Under its *Criminal Code*, Canada also prohibits bribery and related activities in respect of domestic government officials and bribery in the context on non-government parties (i.e., secret commissions).

In the United States, there is a well-established process that allows companies to voluntarily disclose *Foreign Corrupt Practices Act* violations and negotiate deferred or non-prosecution agreements with the U.S. authorities providing for the payment of fines and the imposition of monitors who oversee remediation, all without there having to be a criminal conviction of the company. The U.K. has also adopted a similar deferred prosecution agreement process.

In 2018, Canada adopted a similar regime, which it calls "Remediation Agreements." There was an attempt to use the Remediation Agreement process by SNC-Lavalin with regard to pending charges related to alleged bribes paid to Libyan government officials. This attempt was rejected by the Public Prosecution Service of Canada, which then proceeded with the prosecution. It has been noted that Canada's Remediation Agreement framework is statutory in nature (as opposed to being a matter of policy flowing from prosecutorial discretion as it is in the United States), which greatly restricts flexibility for the PPSC in deciding whether or not to allow a Remediation Agreement to go forward.

Ultimately, SNC-Lavalin entered into a plea agreement that saw a subsidiary plead guilty to a fraud related offence and required SNC-Lavalin to undergo rigorous remediation and monitoring. It was also required to pay a fine of C$280 million over five years. This outcome largely replicated what would have been done under a Remediation Agreement.

The second-ever Remediation Agreement was approved by the Superior Court of Québec in May 2023. The first Remediation Agreement in Canada to deal with offences under the federal *Corruption of Foreign Public Officials Act*, the agreement arose from allegations that Ultra Electronics Forensic Technology Inc. bribed Philippine officials to secure government contracts. A notable element of the Court's approval decision is its view that a high level of deference is owed to a Remediation Agreement.

Duties and Taxes on the Importation of Goods

Importers are required to declare imported goods upon entry into Canada and to pay customs duties and excise taxes, if applicable, to Canada's customs authority, the Canada Border Services Agency (CBSA). Goods are subject to varying rates of duties depending upon the type of commodity and its country of origin. As a member of CUSMA, Canada accords preferential tariff treatment to goods of U.S. and Mexican origin; in most cases, these goods may be imported duty-free. Canada's other trade agreements also offer preferential tariff treatment to goods.

In Canada, the importer of record is the person identified on importation documentation including the "B3" Canada Customs Coding Form used for this purpose. This person is not necessarily the 'true importer' that is liable to pay duties, however. A recent decision from Canada's International Trade Tribunal ruled that a customs broker acting as the importer of record was not the true importer since they merely provided freight-forwarding services and never purchased the goods, took title or possession of them, nor participated in their sale. The broker was therefore not liable for additional duties assessed by the Canada Border Services Agency. It is important that this distinction be taken into account when drafting contractual agreements that may involve the importation of goods into Canada.

The amount of customs duties payable is a function of the rate of duty (determined by the tariff classification and the origin of the goods, as set out in the Schedule to Canada's Customs Tariff) and the value for duty. Canada has adopted the World Customs Organization's Harmonized System of tariff classification, as have all of Canada's major trading partners.

In accordance with Canada's obligations under the WTO's agreement regarding customs valuation, the value for duty of goods imported into Canada is, if possible, to be based on the price paid or payable for the imported goods, subject to certain statutory adjustments. This primary basis of valuation is called the "transaction value method:"

— An example of an adjustment that would increase the value for duty of the goods is a royalty payment, if the royalty is required to be paid by the purchaser of the imported goods as a condition of the sale of the goods for export to Canada.

— An example of an adjustment that would allow for a deduction from the price paid or payable is the transportation cost incurred in shipping the goods to Canada from the place of direct shipment, if such costs are included in the price paid or payable by the importer.

If for one reason or another (e.g., where there has been no sale of the goods) the transaction value of the goods may not be used as a basis for the declared customs value, Canadian legislation provides alternative methods for valuation. These methods must be applied sequentially. In addition to customs duties, Goods and Services Tax (GST) in the amount of 5% is also payable upon the importation of goods. This GST rate is applied to the duty-paid value of the goods. Provided that they have acquired the goods for use in commercial activity, importers registered under the *Excise Tax Act* will be able to recover GST paid upon importation by claiming an input tax credit. See **Sales and Other Taxes — Federal Goods and Services Tax**.

Other Requirements for Imported Goods

Certain imported goods are required to be marked with their country of origin. These generally fall within the following product categories: goods for personal or household use; hardware, novelties and sporting goods; paper products; wearing apparel; and horticultural products. Certain types of goods, or goods imported under specific conditions, are exempt from the country-of-origin-marking requirement.

Prepackaged products (i.e., products packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer without being repackaged) imported into Canada are also subject to requirements under the federal *Consumers Packaging and Labelling Act*. Consumer textile articles are subject to the requirements of the federal *Textile Labelling Act*.

There are also significant legislative requirements relating to the importation of foods, agricultural commodities, aquatic commodities and agricultural inputs. They are all subject to the inspection procedures of the Canadian Food Inspection Agency (CFIA).

Counterfeit trademark or pirated copyright goods may be detained upon importation into Canada. In accordance with the *Copyright Act* and the *Trademarks Act*, the owner of a valid Canadian copyright or a Canadian trademark holder registered with the Canadian Intellectual Property Office (CIPO) is eligible to file a Request for Assistance (RFA) application with the CBSA. This RFA provides an important enforcement tool for intellectual property rights. Using the RFA, the CBSA can identify and detain commercial shipments suspected of containing counterfeit trademark or pirated copyright goods. When the CBSA detects such goods, the CBSA can use the information contained in the RFA to contact the rights holder. The rights holder may then pursue a court action if necessary. The RCMP is responsible for undertaking any criminal investigations related to commercial scale counterfeiting and piracy.

In addition to the prohibitions on goods made with forced labour or child labour noted above, certain other goods are prohibited from being imported into Canada. These include: materials deemed to be obscene under the *Criminal Code*; base or counterfeit coins; certain used or second-hand aircraft; goods produced wholly or in part by prison labour; used mattresses; any goods in association with which there is used any description that is false in a material respect as to their geographical origin; certain used motor vehicles; certain parts of wild birds; certain hazardous products; white phosphorus matches; certain animals and birds; materials that constitute hate propaganda; and certain prohibited weapons and firearms.

Trade Remedies

Canada maintains a trade remedy regime that provides for the application of additional duties and/or quotas to imported products, where such products have injured or threaten to injure the production of like goods in Canada.

The federal *Special Import Measures Act* provides for the levying of additional duties on “dumped” products (i.e., products imported into Canada at prices lower than the comparable selling price in the exporting country) if they have caused or threaten to cause injury to Canadian industry. The process by which a determination is made as to whether duties should be applied to products that are alleged to be dumped is divided between the CBSA and the CITT, with the CBSA investigating whether the products in question are being dumped and the CITT determining if such dumping is causing harm to the Canadian industry. Affirmative findings are required from both institutions for non-provisional duties to be applied to dumped products.

Duties may also be levied in instances of countervailable subsidies being provided by the government in the country of export, and if such subsidized products injure or threaten to injure Canadian industry. Further, Canada may apply safeguard surtaxes or quantitative restrictions on imports where it is determined that Canadian producers are being seriously injured or threatened by increased imports of goods into Canada. These measures may be applied regardless of whether the goods have been dumped or subsidized.

Government Procurement of Goods and Services

Canada is party to a number of trade agreements that impose restrictions and requirements on government procurement. Among other things, these agreements restrict the extent to which governments may favour domestic goods and services in their procurement processes.

The *WTO Agreement on Government Procurement*, CETA (Chapter 19), CPTPP (Chapter 15) and the CFTA (Chapter Five) all set out numerous requirements for procurement of goods and services that must be satisfied by the parties to those agreements, including Canada. These requirements include provisions that address technical specifications; the qualification of suppliers; the design and issuance of requests for proposals; selective tendering procedures; tender documentation; negotiations that may occur during the tender; the process of submitting, receiving and opening tenders and awarding contracts; limited tendering procedures; and bid challenges. They apply to federal government departments and entities, as well as to various government enterprises and Crown corporations. In certain circumstances, they also apply to provincial government entities, including municipalities, municipal organizations, school boards and publicly funded academic, health and social service entities.

Pursuant to its obligations, Canada's bid challenge authority for federal procurement is the Canadian International Trade Tribunal (CITT). Where the CITT finds that a procurement complaint is valid, it may recommend that a new solicitation be issued, the bids re-evaluated, the existing contract terminated and the contract awarded to the complainant or the complainant compensated for its loss of the contract. The CITT may also award costs incurred by the complainant in preparing a response to the solicitation.

As noted above, CETA contains significant government procurement obligations that apply not only at the federal level, but also at the provincial and municipal levels of government. See **Government Procurement**.

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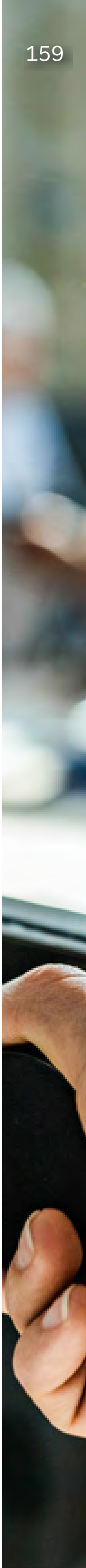
EMPLOYMENT

By Ben Aberant and Pat Pengelly



EMPLOYMENT

Employment in Canada is a heavily regulated area governed by either federal or provincial legislation. The majority of employers are covered by provincial legislation, with the exception of "federal works or undertakings," which include businesses involved in banking, shipping, railways, pipelines, airlines and airports, interprovincial transportation, broadcasting and telecommunications industries.

The types of employment-related legislation with which employers operating in Canada should be familiar include legislation dealing with:

- employment standards;
- labour relations;
- human rights;
- occupational health and safety;
- accessibility standards;
- federal and provincial privacy rules; and
- employment benefits, including pension, employment insurance and workers' compensation.

The employment relationship in Canada is governed by a broad array of legislation and common law principles. Employers need to be aware of the various legal considerations to avoid attracting liability in the workplace

Employment Standards

All jurisdictions in Canada have enacted legislation that establishes certain minimum employment standards. Generally, employment standards acts (ESAs) are broad and apply to employment contracts, whether oral or written. The standards defined in the ESAs are minimum standards only, and employers are prohibited from contracting out of or otherwise circumventing the established minimum standards. These laws spell out which classes of employees are covered by each minimum standard and which classes of employees are excluded. Although standards vary across jurisdictions, many topics covered are common to all ESAs, including minimum wages, maximum hours of work, overtime hours and wages, rest and meal periods, statutory holidays, vacation periods and vacation pay, layoff, termination and severance pay and leaves of absence. The leaves of absence protected by ESAs vary across provinces, but may include sick leave, bereavement leave, maternity/paternity/parental/adoption leave, reservist leave, compassionate care/family medical leave, organ donor leave, personal emergency leave, family responsibility leave and crime-related death and disappearance leave.

Unlike employers in the United States, Canadian employers may not terminate employees "at will." Generally, employers must provide required notice of termination, unless they have just and sufficient cause (Cause) to terminate an employee without notice. The length of the required notice period varies among jurisdictions, but generally increases with an employee's length of service. In Alberta, for example, employees with a minimum of three months of service are generally entitled to at least one week's notice of termination, with a maximum eight-week notice period for employees with 10 or more years of service. Employers are required either to give "working notice" of an employee's job termination or provide pay in lieu of notice.

UNLIKE EMPLOYERS IN THE UNITED STATES, CANADIAN EMPLOYERS MAY NOT TERMINATE EMPLOYEES "AT WILL."

Subject to narrow exceptions, an employer is not required to give notice or pay in lieu of notice if the termination is for Cause. Cause is a high standard and includes, for example, wilful misconduct or serious disobedience.

Certain classes of employees, including construction workers, employees on a temporary layoff and employees terminated during or as a result of a strike or lockout may, on certain conditions, be exempted from the termination notice provisions of the legislation depending on the jurisdiction.

In most jurisdictions, special provisions apply where a significant number of employees are terminated within a specified period of time. These provisions include, at the very least, advance written notice to the director of employment standards or an equivalent governmental authority.

Some jurisdictions provide for severance pay as an additional benefit to employees. For example, under the federal rules, all employees who have been employed for 12 consecutive months are entitled to severance pay equal to the greater of: five days of regular pay or two days of regular pay for each completed year of service.

In Ontario, an employee with five or more years of service may be entitled to severance pay if the employer, as a result of the discontinuation of all or part of its business, terminates 50 or more employees in a six-month period or if the employer has an annual payroll of C$2.5 million or more. Severance pay is calculated on the basis of an employee’s length of service and may reach a maximum of 26 weeks of regular pay. As with pay in lieu of notice of termination, employees may be disqualified from receiving severance pay if they have engaged in wilful misconduct or disobedience or if they fall within other exceptions specified in the legislation.

In addition to minimum statutory termination and severance pay entitlements, a terminated non-union employee may be entitled by common law (or civil law in Québec) to additional notice of termination or pay in lieu of notice. This right may be enforced before the courts. The amount of notice will depend on the employee’s individual circumstances, including length of service, age, the type of position held and the prospect for future employment. In most jurisdictions, an employer can limit its liability to the statutory minimum in an employment contract. Employers who wish to avoid or limit liability for common law pay in lieu of notice should therefore have clear terms in written contracts. The manner in which an employer treats an employee at the time of dismissal is also important because an employer may be liable to compensate an employee for any actual damages caused by tortious conduct.

The *Canada Labour Code* does not permit federally regulated employers to dismiss employees without Cause (with the legislated exceptions of employees with less than 12 months’ service, managerial employees and dismissals that occur due to lack of work or elimination of a position). Accordingly, a federally regulated employer may also face a complaint of unjust dismissal under the *Canada Labour Code* if it dismisses an employee to whom this protection applies without Cause. If an adjudicator finds that the employee’s complaint is valid, the remedy can include an award for lost wages and benefits and reinstatement of employment.

Similarly, in Québec, an employee with at least two years of uninterrupted service to whom an *Act Respecting Labour Standards* is applicable may make a complaint for dismissal without good and sufficient cause. Upon finding that the complaint is valid, the adjudicator may also order reinstatement, the payment of lost wages and any other order that he or she believes to be fair and reasonable, taking into account all the circumstances of the matter.

In Québec, the ESA specifically provides all employees — unionized or not — with a right to a psychological harassment-free workplace and creates a special recourse for employees who believe they have been victims of such harassment. Employers are required to take reasonable steps to prevent psychological harassment and, should such harassment occur, take reasonable steps to put an end to it.

Labour Relations

The federal government and each province have enacted legislation governing the formation and selection of unions and their collective bargaining procedures. In general, where a majority of workers in an appropriate bargaining unit are in favour of a union, that union will be certified as the representative of that unit of employees. An employer must negotiate in good faith with a certified union to reach a collective agreement. Failure to do so may result in penalties being imposed. Most workers are entitled to strike if collective bargaining negotiations between the union and the employer do not result in an agreement; however, workers may not strike during the term of a collective agreement.

Human Rights

The *Canadian Charter of Rights and Freedoms* (Charter) is a constitutional charter that governs the content of legislation and other government actions. It contains anti-discrimination provisions that may be enforced by the courts. In addition, all Canadian jurisdictions have enacted human rights codes or acts that specifically prohibit various kinds of discrimination in employment, including harassment. Whereas the Charter applies only to the actions of government, human rights legislation applies more broadly to the actions of private individuals and corporate entities, including employers of virtually every description.

Human rights legislation states that persons have a right to equal treatment and a workplace free of discrimination on the basis of any of the prohibited grounds. These vary somewhat from one jurisdiction to another, but generally include race, ancestry, place of origin, colour, ethnic origin, religion, gender (including pregnancy), sexual orientation, gender identity,

HUMAN RIGHTS LEGISLATION STATES THAT PERSONS HAVE A RIGHT TO EQUAL TREATMENT AND A WORKPLACE FREE OF DISCRIMINATION ON THE BASIS OF ANY OF THE PROHIBITED GROUNDS.

gender expression, age, marital status, family status and physical or mental disability (which may include a diagnosed dependency), among others. In some jurisdictions, discrimination on the basis of a criminal record that is not related to the individual's ability or fitness to perform the job is also prohibited. The law prohibits direct discrimination on such grounds and also constructive or systemic discrimination, whereby a policy that is neutral on its face has the effect of discriminating against a protected group. However, employers may maintain qualifications and requirements for jobs that are bona fide and reasonable in the circumstances.

The first step in the analysis of discrimination is for an employee to demonstrate that discrimination has occurred, or that he or she has been treated differently in a term or condition of employment on the basis of one of the enumerated grounds. Once an employee or former employee can demonstrate that discrimination has likely occurred on the basis of one of the enumerated grounds, the employer has the burden of proof to establish that the offending term or condition of employment is a bona fide occupational requirement (BFOR). The duty to accommodate arises when considering whether a workplace requirement or rule is a BFOR. An employer must demonstrate that the workplace rule was adopted for a rational purpose and in a good faith belief that it was necessary, and that it is impossible to accommodate individuals without undue hardship. "Undue hardship" is a high standard, requiring direct, objective evidence of quantifiable higher costs, the relative interchangeability of the workforce and facilities, interference with the rights of other employees or health and safety risks. The employer must assess each employee individually to determine whether it would be an undue hardship to accommodate his or her particular needs.

Occupational Health & Safety

The federal government and all provincial jurisdictions have enacted laws designed to ensure worker health and safety, as well as to provide compensation in cases of industrial accident or disease. Employers must set up and monitor appropriate health and safety programs. In provinces such as Alberta, Saskatchewan, Manitoba and Ontario, occupational health and safety legislation requires a

THE FEDERAL GOVERNMENT AND ALL PROVINCIAL JURISDICTIONS HAVE ENACTED LAWS DESIGNED TO ENSURE WORKER HEALTH AND SAFETY, AS WELL AS TO PROVIDE COMPENSATION IN CASES OF INDUSTRIAL ACCIDENT OR DISEASE.

workplace violence and/or harassment policy. The purpose of occupational health and safety legislation is to protect the safety, health and welfare of employees, as well as the safety, health and welfare of non-employees entering work sites.

Occupational health and safety officers have the power to inspect workplaces. Should they find that work is being carried out in an unsafe manner or that a workplace is unsafe, they have the power to order the situation to be rectified and to make “stop-work” orders if necessary. Contraventions of the acts, codes or regulations are treated very seriously, and may result in fines or imprisonment. Recent changes to the *Criminal Code* have also increased potential employer liability for failing to ensure safe workplaces.

Workplace Violence and Harassment

As part of maintaining a safe workplace, most Canadian jurisdictions have legislation providing for employer obligations in respect of the prevention of workplace violence and harassment, including violence or harassment by customers or the public. In several jurisdictions, these obligations extend to the duty to prevent and to address incidents of sexual harassment. In the province of Québec, psychological harassment in the workplace is addressed in employment standards legislation. The requirements of workplace violence and harassment legislation vary by jurisdiction, but employers need to ensure that they are aware of their obligations and remain in full compliance. Some key features of the legislation require employers to:

— assess risk in the workplace, based on a number of prescribed factors;

— develop policies and procedures relating to workplace violence and harassment;

— provide employee training; and

— develop procedures for investigating incidents of workplace violence or harassment.

Accessibility Standards

In Ontario, the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) places specific disability accommodation requirements on various categories of organizations in Ontario. The goal of the AODA is to provide accessibility for all those with disabilities. The obligations on employers and businesses have been rolled out slowly since 2012. In 2016 and 2017, the last significant block of employment obligations becomes effective on all employers. The AODA imposes a number of employment related obligations on employers. Among the obligations imposed by the AODA are that employers must:

— develop, adopt and maintain an accessible employment policy statement;

— provide disability awareness training (for employers with more than five employees) to be completed between three and five years from the time the standard comes into force;

— develop, adopt and maintain procedures for accommodating employees in the recruitment, assessment, selection and hiring stages;

— provide internal and external notification of disability accommodation and consult with job applicants requesting accommodation about possible accommodation;

— develop and maintain individualized accommodation and return to work plans for employees;

— maintain materials regarding policies and procedures that support employees with disabilities and information on how to request accommodation; and

— provide AODA mandated policies and/or materials to inspectors as requested.

In addition to the obligations relating to employment, the AODA also imposes accessibility obligations on companies with respect to customer service, physical premises and information and communications.

The AODA was the first of its kind in Canada. Manitoba and Nova Scotia have since passed similar legislation. On June 21, 2019, the Canadian federal government passed similar legislation, the *Accessible Canada Act*, which applies to federally regulated entities, including private sector employers.

Privacy

Employers in Canada must be aware that Canada has privacy laws governing the collection, use, disclosure, storage and retention of personal employee information, as well as an employee's right to access such information. This is especially important in Québec, Alberta and British Columbia, which have already enacted privacy legislation separate from the federal legislation. See **Privacy Laws**.

Employment Benefits

The Canada Pension Plan is a federally created plan that provides pensions for employees, as well as survivors' benefits for widows and widowers and for any dependent children of a deceased employee. All employees and employers, other than those in the Province of Québec, must contribute to the Canada Pension Plan. The employer's contribution is deductible by the employer for income tax purposes. Québec has a similar pension plan that requires contributions by employers and employees within Québec.

In addition to the Canada Pension Plan, both employees and employers must contribute to the federal Employment Insurance Plan, which provides benefits to insured employees when they cease to be employed, when they take a maternity or parental leave and in certain other circumstances. The employer's contribution is deductible for income tax purposes. Québec also has its own Parental Insurance Plan, which provides benefits to insured employees when they take a maternity or parental leave and to which both employers and employees in Québec contribute. All provinces provide comprehensive schemes for health insurance. These plans provide for medically necessary treatment, including the cost of physicians and hospital stays. They do not replace private disability or life insurance coverage.

Funding of public health insurance varies from one provincial plan to another. In some provinces, employers are required to pay premiums or health insurance taxes. In other provinces, individuals pay premiums or the entire cost of health insurance is paid out of general tax revenues.

Employers commonly also provide supplemental health insurance benefits through private insurance plans to cover health benefits not covered by the public health insurance plan.

Employers may be required to provide sick or injured worker benefits in the form of workers' compensation, a liability and disability insurance system that protects employers and employees in Canada from the impact of work-related injuries. This benefit compensates injured workers for lost income, health care and other costs related to their injury. Workers' compensation also protects employers from being sued by their workers if they are injured on the job.

Other laws in Canada address additional benefits such as private pensions and private benefit plans. For example, most Canadian jurisdictions have pension standards legislation that establishes minimum requirements for private pension plans.

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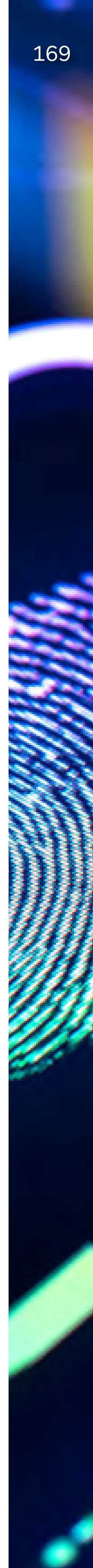
PRIVACY LAWS

By Eugen Miscoi, Jon Adessky and Pierre Dushime



PRIVACY LAWS

Summary

All businesses in Canada are subject to legislation that regulates the collection, use and disclosure of personal information in the course of commercial activity and in some jurisdictions, in the management of employees. "Personal information" generally means information about an identifiable individual. The collection, use and disclosure of personal information by private sector organizations within the provinces of British Columbia, Alberta and Québec are regulated by legislation enacted by each of those provinces, while a federal private sector privacy law governs the collection and processing of personal information in the rest of Canada.

ALL BUSINESSES IN CANADA ARE SUBJECT TO LEGISLATION THAT REGULATES THE COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION IN THE COURSE OF COMMERCIAL ACTIVITY.

These statutory regimes are all generally built upon the following 10 principles that govern the collection, use and disclosure of personal information:

— accountability;

— identifying purposes;

— consent;

— limiting collection;

— limiting use, disclosure and retention;

— accuracy;

— security safeguards;

— openness;

— individual access; and

— challenging compliance.

In addition to general private sector privacy laws, Alberta, Manitoba, Nova Scotia, New Brunswick, Newfoundland and Labrador, Ontario, Québec and Saskatchewan also have specific health privacy legislation to protect personal health information. For example, Ontario's *Personal*

Health Information Protection Act, 2004 establishes rules for the collection, use and disclosure of personal health information by health information custodians in Ontario.

Federal Private Sector Privacy Law — PIPEDA

At the federal level, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) governs the collection, use and disclosure of personal information in provinces and in the territories that have not adopted substantially similar privacy legislation, as well as in the course of interprovincial and international commercial activities. PIPEDA applies to all federally regulated works, undertakings or businesses, regardless of the province in which they operate. This includes entities such as banks, airlines, telecommunications service providers and other organizations operating under federal jurisdiction. As outlined in greater detail below, if and when the *Consumer Privacy Protection Act* (CPPA) — introduced by *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts* (Bill C-27) is adopted, the regime for the protection of personal information set out in PIPEDA will be modernized to bring it in close alignment with Québec's Act to *modernize legislative provisions respecting the protection of personal* information (Law 25 and formerly known as Bill 64).

Unless certain exceptions apply, an individual's knowledge and consent are required to collect, use or disclose their personal information. Explicit consent may be required for more sensitive personal information (e.g., medical or financial information), while implicit consent may be sufficient for non-sensitive personal information (e.g., mailing address). Pursuant to amendments to PIPEDA adopted in 2015, the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization's activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting. Exceptions to the "consent" requirement include disclosures of personal information in the context of certain business transactions, as defined in the law.

The Office of the Privacy Commissioner's (OPC) *Guidelines for Obtaining Meaningful Consent* (Guidelines) clarify that failure to obtain meaningful consent may lead a business to lose its ability to handle personal information needed to operate the business. In order to obtain meaningful consent, businesses are encouraged to: (i) ensure that their privacy policy is written in plain language; (ii) use just-in-time privacy notices on their website as a supplement to the longer form privacy policy; (iii) prepare an executive summary of their privacy policy's key highlights to place at the top of the privacy policy; and (iv) use interactive tools in the presentation of their privacy information.

Provincial Privacy Laws

Alberta, British Columbia and Québec have adopted their own private sector privacy laws that may apply instead of PIPEDA for both consumer and employee personal information practices of organizations within these provinces. These laws have been deemed substantially similar to PIPEDA. As such, the following section offers a comprehensive overview of Québec's privacy regime, focusing solely on this province due to the fact that it establishes some of the most stringent requirements applicable in Canada. In other words, complying with Québec's privacy regime ensures material compliance with other privacy regimes across the country.

Québec

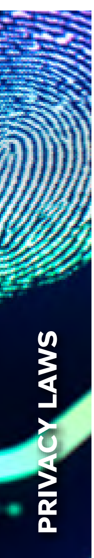
The *Act respecting the protection of personal information in the private sector* (Québec Act) applies to the collection, use or disclosure (referred to as 'communication') of personal information within the province by 'any person carrying on an enterprise'. This privacy regime has gone — and continues to go through — amendments introduced by Law 25. Table 1 below summarizes key new obligations brought forth by Law 25, organized by their entry into force date.

Table 1: Summary of Amendments and Timeline of Entry Into Force Dates

SEPTEMBER 22, 2022:	SEPTEMBER 22, 2023:	SEPTEMBER 22, 2024:

New Obligations
— Appointment of a Privacy Officer
— Mandatory Breach Reporting
— Consent exceptions for:
  — Commercial Transactions; and
  — Study, Research, or Statistics
— Disclosure of biometric databases for authentication to Québec's Commission d'accès à l'information (CAI)
	New Obligations
	— Privacy Framework
	— Additional transparency requirements
	— Privacy Impact Assessments
	— Privacy by default and by design
	— De-indexation rights
	— Additional consent requirements
	— Cross-border transfers of personal information
	— New regime for the secondary use of personal information
	— Strict retention and destruction obligations
	— New obligation when an automated decision is made using an individual's personal information
	— New regime for business contact information
	— New sanctions for non-compliance
		New Obligations
		— Right to Data Portability

A significant development brought forth by Law 25 are the monetary fines that could result from non-compliance with the Québec Act. Effective September 22, 2023, the CAI may impose an administrative monetary fine for non-compliance of up to C$10 million or 2% of worldwide turnover for the preceding fiscal year, whichever is greater. Alternatively, the CAI can institute court proceedings with potential maximum penal fines of up to C$25 million or 4% of worldwide turnover the preceding fiscal year, whichever is greater. In the case of subsequent non-compliance, fines may be doubled. The CAI's **General Framework for Application of MAPs** determines initial fines for various levels of non-compliance, which is used to classify the severity of non-compliance into four categories: minor, moderate, serious, and very serious.



This categorization determines the base penalty. Subsequently, the CAI adjusts the base amount based on factors like the non-compliance's nature, potential harm, and data sensitivity. Thus, the base amounts are not minimum and may be lower if mitigating factors exist. However, fines can substantially increase with aggravating factors, up to C$10 million or 2% of an organization's prior-year global turnover, whichever is larger.

Key Trends in Canadian Privacy Laws

Privacy breach notifications and record keeping

For many years, *Alberta's Personal Information Protection Act* (Alberta PIPA) was the only general private sector privacy law in Canada that imposed a statutory obligation on private sector organizations to report privacy breaches. Under Alberta PIPA, organizations must only report (to the Information and Privacy Commissioner of Alberta) privacy breaches that could pose a "real risk of significant harm to an individual." The Information and Privacy Commissioner of Alberta in turn determines whether an organization needs to notify the individuals affected.

As of November 1, 2018, due to amendments made to PIPEDA by virtue of the *Digital Privacy Act*, organizations across Canada must comply with new mandatory breach notification rules. Organizations subject to PIPEDA have reporting, notice and record retention obligations for any breach of security safeguards. A breach of security safeguards is broadly defined as: "the loss of, unauthorized access to, or unauthorized disclosure of personal information resulting from a breach of an organization's security safeguards." Reporting and notification obligations are triggered when there is a real risk of significant harm to an individual (RROSH). RROSH is also broadly defined and includes "bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record, and damage to or loss of property." The factors that are relevant to determine whether a breach creates a RROSH include the sensitivity of the personal information involved in the breach of security safeguards, as well as the probability that the personal information has been, is, and/or will be misused.

The report of the breach to the OPC must be made "as soon as feasible after the organization determines that the breach has occurred." The same criteria apply for notifying individuals of breaches involving their personal information unless the law provides otherwise.

The notification needs to be conspicuous and contain sufficient information to help affected individuals mitigate the risk of harm. Information as to what information should be included in written reports to the OPC and individual notifications can be found in the *Breach of Security Safeguards Regulations*. Furthermore, whether or not there is a RROSH, an organization must keep a security-breach log for 24 months following a breach of security safeguards. During this period, organizations must comply with requests from the OPC to have access to the record at any time. Further, an organization encountering a breach will have additional reporting obligations to other organizations and government institutions if the breached organization believes the other organizations may be able to reduce their risk of harm as a result.

Organizations subject to PIPEDA face liability for knowingly violating the notification requirements. An organization may be liable for fines up to C$100,000 per violation. In addition, PIPEDA provides the federal privacy commissioner with the right to make public any information that comes to his or her attention in the performance or exercise of any of his or her duties, as well as make public any information in security-breach notification reports to the OPC, if he or she judges there is a public interest for doing so. Overall, these provisions introduce more stringent privacy, consent and breach notification obligations.

In Québec, Law 25 has introduced new notification requirements for private sector companies who are the target of a privacy breach, or as referred to in Law 25 as a "confidentiality incident." A confidentiality Incident is defined as an unauthorized access, use, or communication of personal Information, loss of personal information, or any breach in the protection of such information. In the event of a confidentiality incident that poses a "risk of serious injury," companies are obligated to take reasonable measures to mitigate the risk and prevent similar incidents. Determining whether a specific incident poses a "risk of serious injury" depends on several factors, including the sensitivity of the information involved, the potential consequences that may arise from its use and the likelihood that the information will be utilized for harmful purposes. In the occurrence of a "risk of serious injury," organizations are obligated to promptly notify both the CAI and the individuals who are affected.

Cross-Border Data Transfer

With respect to transfers of personal information to service providers located outside Canada, the "openness" principle under PIPEDA has been held by federal privacy regulators to require that notice of such transfers should be provided to affected individuals. Alberta PIPA requires that organizations notify individuals if they transfer personal information to a service provider located outside Canada. In Québec, effective from September 22, 2023, Law 25 brings forth new obligations for businesses involved in cross-border transfers of personal information. At the time the information is collected and on request, businesses must inform individuals of the possibility that the information collected may be communicated outside Québec. Before communicating personal information outside of Québec, a cross-border privacy impact assessment must be conducted to establish that the information transferred will receive adequate protection in the target transfer jurisdiction. The assessment considers factors such as the sensitivity of the information, intended purposes, protection measures, and the legal framework of the receiving jurisdiction. Cross-border transfers must also be the subject of a written agreement that takes into account the results of the assessment, and terms agreed upon that mitigate risks. It is worth noting that these requirements apply equally between interprovincial and international transfers of personal information.

Guidelines for Businesses

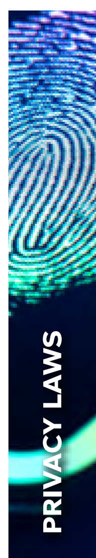
Whether PIPEDA or similar provincial legislation is the applicable privacy regime, immediate priorities for most organizations that establish a business in Canada should be:

— the adoption of a documented privacy compliance strategy that identifies the organization's compliance with the applicable regulatory regimes;

— the adoption of an external and internal privacy policy, and personal information management practices to ensure compliance with applicable privacy laws;

— the appointment of an individual who will be responsible for the administration and oversight of the organization's personal information management practices and who will be prepared to implement any changes required by applicable legislation;

IMMEDIATE PRIORITIES FOR MOST ORGANIZATIONS THAT ESTABLISH A BUSINESS IN CANADA SHOULD INCLUDE THE APPOINTMENT OF AN INDIVIDUAL WHO WILL BE RESPONSIBLE FOR THE ADMINISTRATION AND OVERSIGHT OF THE ORGANIZATION'S PERSONAL INFORMATION MANAGEMENT PRACTICES.



- a review of the current personal information practices of the organization outside Canada and proposed information practices within Canada, including determining what personal information is collected, and from where; what consents are obtained and what purposes are identified when collecting personal information; where personal information is stored; how personal information is used; when and to whom personal information is disclosed; and how current personal information practices of the organization may need to be changed for the collection, use and disclosure of personal information in Canada;
- a review of the organization's data management infrastructure to ensure that the infrastructure is adequately flexible and robust to facilitate the implementation of the organization's privacy policies and data management practices;
- the implementation of consent language in contracts, forms (including Web forms) and other documents utilized when collecting personal information from individuals (including customers and employees);
- a review of agreements to ensure that where there are contracts with third parties to whom personal information will be disclosed (or where the third party is granted access to the personal information), that the third party agrees to appropriate contractual terms, such as: specifying the ownership of the data and ensuring that the third party will provide adequate security safeguards for the information; ensuring that the personal information will be used only for the purposes for which it was disclosed to the third party; ensuring that the third party will cease using (and return or destroy) the personal information if requested; and providing for indemnification by the third party for any breach of such terms;
- the preparation of privacy impact assessments to adequately assess risks to personal information for new projects and cross-border data transfers; and
- the adoption of a privacy breach response plan that clearly specifies internal contacts and external advisors so that there is no mistake about who is to be contacted for immediate support in the case of an incident. An organization must be able to quickly identify a privacy breach, immediately carry out its plan of action, isolate the affected systems, determine the damage and remediate.

Implementation of such initial steps may require several months, depending on the size and maturity of the organization.

Non-compliance

Compliance with privacy laws needs to be considered in any business transaction involving the disclosure or transfer of personal information, such as purchases or sales of businesses, outsourcing transactions and securitization transactions. For example, when considering the acquisition of a business in Canada, it is crucial that a review of the target company's privacy policies and practices be included as part of the due diligence process. If personal information of employees or customers has to be disclosed to the purchaser during the due diligence process, it is also essential that an appropriate confidentiality regime be established for the process. It is recommended that only personal information that is necessary or likely to affect the decision to proceed with a transaction or its terms (including price) be disclosed.

Failure to comply with privacy laws can result in complaints to the relevant privacy commissioner, orders and fines. An organization with deficient privacy practices may risk adverse publicity for failure to comply with privacy laws.

Law 25 introduces new consequences for non-compliance for businesses with operations in Québec. See **Québec**.

In light of the complexity of privacy laws and the differences between the various laws that may apply to an organization or to a particular business unit, ensuring privacy compliance across an organization's departments may be challenging, particularly for organizations that operate globally.

It is important to note that these exceptions to consent in case of emergency situations can vary across Canadian privacy statues and may contain certain conditions. Generally, a notice of disclosure should be given to the individual before or without delay after the fact, if possible. In addition, these legislative authorizations do not always apply to "regular" business operations. Organizations are therefore encouraged to take into account applicable laws, before applying legislative authorizations that provide exemptions to the requirement to obtain consent for the collection, use and disclosure of personal information. Finally, the COVID-19 pandemic also raised concerns regarding information security aimed particularly at remote working arrangements. In order to meet their privacy obligations, organizations must take all the reasonable steps to ensure that the data is protected appropriately from theft, loss, unauthorized disclosure and other compromise.

Upcoming and Ongoing Changes to the Canadian Privacy Regime

Canadian federal and provincial governments have been advancing bills and passing legislation to modernize the privacy landscape under their respective jurisdictions.

— Federally, Bill C-27 seeks to modernize the federal privacy regime. As such, Bill C-27 creates three new acts: (i) the CPPA, which replaces the privacy sections of the current federal private sector privacy law, PIPEDA; (ii) the *Personal Information and Data Protection Tribunal Act* (PIDPTA), which would create an appeals tribunal for privacy decisions under the CPPA; and (iii) the *Artificial Intelligence and Data Act* (AIDA), which would be Canada's first law that directly regulates artificial intelligence. Bill C-27 is making its way through the federal legislative process and is likely to evolve before its three new acts become law (if and when they do).

— Provincially, the Québec Act has been overhauled by Law 25. Law 25 received royal assent on September 22, 2021, and significantly changes Québec's privacy regime via a three-phased entry into force of its European-style framework on September 22 of 2022, 2023 and 2024.

These modernization efforts are unfolding in the context of a broader global movement toward ever-increasing privacy obligations for organizations that collect and process personal information in the context of their operations. Please contact our multidisciplinary Cyber/Data Group for practical advice on how to efficiently stay on top of all applicable requirements in Canada.

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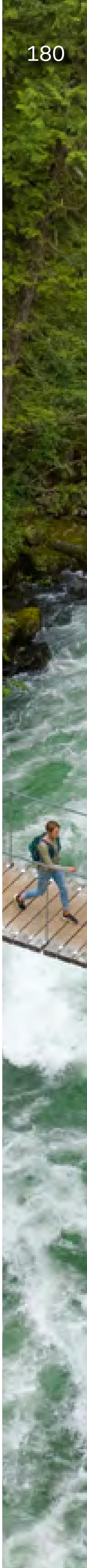
ENVIRONMENTAL REGULATION

By Una Radoja



ENVIRONMENTAL REGULATION

Environmental regulation in Canada is an area of shared responsibility between the federal government and the provincial governments, which, in turn, have delegated certain matters to municipal governments.

Both the federal and provincial governments have enacted legislation, regulations, policies and guidelines that affect industry on environmental matters such as pollution or contamination of the air, land and water, toxic substances, hazardous wastes, greenhouse gas emissions, spills, and transportation of dangerous goods. In addition, there are requirements for approvals and environmental impact assessments in many areas affecting both the public and private sectors.

Environmental regulators have broad monitoring and inspection powers and use a wide range of enforcement mechanisms. These powers and mechanisms extend not only to the businesses involved, but also to corporate directors, officers, employees and agents if they authorize or acquiesce in an unlawful act or fail to take reasonable measures to ensure compliance, even if the corporation has not been prosecuted. For example, the federal *Canadian Environmental Protection Act* (CEPA) and the federal *Fisheries Act* includes provisions for warnings, significant fines, imprisonment, injunctions and compliance orders. Canadian courts are also now holding companies, as well as their officers, directors and certain employees liable for environmental offences.

Liability for contaminated sites is an important issue in Canada. The law in this area places liability on those persons who cause the pollution (the "polluter pays" principle) and, depending on the particular situation and province, on those persons who own, occupy, manage or control contaminated sites, or who owned, occupied or controlled such sites in the past. Consequently, a "buyer-beware" philosophy prevails, making it critical in business and real estate transactions that either the buyer or the lender knows about all past and potential environmental problems associated with a particular business or property and, in some cases, formerly owned businesses and properties. In certain Canadian provinces, current and former owners and operators of contaminated land, as well as their directors and officers, can face civil actions by future owners of the land or impacted neighbouring property owners, for recovery of remediation costs incurred. Such persons may also face pollution prevention, investigation and remediation orders issued by the provincial regulator. If the contamination affects waters frequented by fish, a charge under the federal *Fisheries Act* may ensue.

Canada has enacted legislation to prevent future contaminated sites and protect water resources, including the CEPA, the *Fisheries Act* and the *Canada Water Act*. Operating in conjunction with provincial regulation, this legislative framework helps Canadian businesses determine if the substances that they are using are deleterious substances and if so the amount that is permitted to be released without penalty. Officers and directors in most Canadian jurisdictions have a positive obligation to take reasonable steps to ensure compliance and to report the release of certain substances. Any business that releases substances that may enter waterways must be in compliance with the laws and accompanying regulations or the business risks potentially significant penalties.

Air pollution is another important issue in Canada. The CEPA creates duties for businesses if there is a release or a likelihood of release into the environment of a listed toxic substance that may threaten the health, safety, and welfare of humans. These duties include reporting, notifying the relevant authorities and members of the public, and deploying preventive measures to reduce the damage to the environment. These obligations also apply to pollution that may have international effects.

As a result of stringent environmental legislation and the regulatory bodies' vigorous approach to investigating and prosecuting environmental concerns, it is prudent for businesses to seek proper advice concerning environmental due diligence.

Federal and provincial governments have developed and started to implement legislation aimed at reducing greenhouse gas emissions. The federal government has begun implementing a federal carbon pricing system in provinces and territories that do not have their own qualified systems in place. The federal system consists of an output-based pricing system that applies to various industries, and a fuel tax that applies to fossil fuels consumed with the province or territory. Climate change law is a developing area across Canada and businesses should ensure they are up to date on current and developing requirements in the provinces where they operate.

Canada enacted the *Impact Assessment Act* (formerly the *Canadian Environmental Assessment Act*) in 2019 in an effort to decrease the environmental, economic, health, and social effects of major projects in Canada as well as the impacts on Indigenous groups and the rights of Indigenous Peoples in Canada. The *Impact Assessment Act* applies to major projects described in the associated project list or those projects designated by the Minister. Once a project is designated, the Act provides tools to support co-operation and co-ordination with other jurisdictions.

Projects that meet the thresholds set out in the project list or that are designated by the Minister undergo a planning phase to determine if an impact assessment is required. Projects that require an impact assessment are reviewed by either the agency or a review panel and a decision is rendered regarding the impacts of the project and any amendments or modifications required. Any business seeking approval of a major project that may require an impact assessment should be aware of the requirements and the timelines associated with approval.

Canada is working to streamline the project approval process through the "one project, one assessment" principle where major projects would only have to undergo either a federal impact assessment or a provincial impact assessment. Streamlining the project approval process will help to attract investment into major Canadian projects by allowing these projects to be completed faster while still in alignment with Canada's sustainability objectives.

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DISPUTE RESOLUTION

By Kosta Kalogiros

DISPUTE RESOLUTION

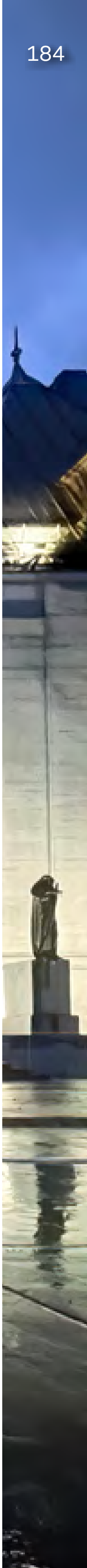
Canada's Court System

Under the *Constitution Act, 1867*, the judiciary is separate from and independent of the executive and legislative branches of government. Judicial independence is a cornerstone of the Canadian judicial system. Judges make decisions free of influence and based solely on fact and law. Canada has provincial trial courts, provincial superior courts, provincial appellate courts, federal courts and a Supreme Court. Judges are appointed by the federal or provincial and territorial governments, depending on the level of the court.

Each province and territory (with the exception of Nunavut) has a provincial court. These courts deal primarily with criminal offences, family law matters (except divorce), traffic violations and provincial or territorial regulatory offences. Private disputes involving limited sums of money are resolved in the small claims divisions of the provincial courts. The monetary ceilings for the small claims division vary from province to province (e.g., British Columbia is set at C$35,000, Alberta is set at C$50,000, and Ontario is set at C$35,000).

The superior courts of each province and territory try the most serious criminal cases, as well as private disputes exceeding the monetary ceiling of the small claims divisions of the provincial courts. Although superior courts are administered by the provinces and territories, the federal government appoints and pays the judges of these courts.

In the Toronto Region of the Province of Ontario, the Superior Court of Justice maintains a Commercial List. Established in 1991, the Commercial List hears certain applications and motions in the Toronto Region involving a wide range of business disputes. It operates as a specialized commercial court that hears matters involving shareholder disputes, securities litigation, corporate restructuring, receiverships and other commercial disputes. Matters on the Commercial List are subject to special case management and other procedures designed to expedite the hearing and determination of complex commercial proceedings. In addition, judges on the Commercial List are experienced in commercial and insolvency matters.



Each province and territory has an appellate court that hears appeals from decisions of the superior courts and the provincial and territorial courts. Ontario also has a Divisional Court that serves as a court of first instance for the review of administrative action. It also hears appeals from provincial administrative tribunals, interlocutory decisions of judges of the Superior Court and appeals from the Superior Court involving limited sums of money (currently C$50,000 or less).

The Federal Court of Canada has limited jurisdiction. Its jurisdiction includes interprovincial and federal provincial disputes, intellectual property proceedings, citizenship appeals, *Competition Act* cases, and cases involving Crown corporations or departments or the government of Canada. The Federal Court, Trial Division hears decisions at first instance. Appeals are heard by the Federal Court of Appeal.

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. It hears appeals from the appellate courts in each province and from the Federal Court of Appeal. The Supreme Court of Canada has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law. There is a right of appeal in certain criminal proceedings, but in most cases, leave must first be obtained. Leave to the Supreme Court of Canada may be granted in cases involving an issue of public importance or an important issue of law.

Class Actions

Class proceedings are procedural mechanisms designed to facilitate and regulate the assertion of group claims. Almost all Canadian provinces have class proceedings legislation. In provinces without such legislation, representative actions may be brought at common law.

Canadian class action statutes are modelled closely on Rule 23 of the United States Federal Court Rules of Civil Procedure, which, together with its state counterparts, governs class action litigation in the United States. Unlike ordinary actions, a proceeding commenced on behalf of a class may be litigated as a class action only if it is judicially approved or “certified.” Generally, the bar for certification in Canada is lower than in the United States.

In Canada, common targets of class actions include product manufacturers, insurers, employers, companies in the investment and financial industries and governments. Class actions may involve allegations of product liability, misrepresentation, breaches of consumer and employment laws, competition law (e.g., antitrust) breaches, securities fraud and breaches of public law.

Class actions have become an increasingly prominent aspect of business litigation in Canada. Businesses may benefit from the fact that individual damage awards tend to be lower in Canada than in the United States. In addition, the availability of punitive damages is limited in Canada.

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) refers to the various methods by which disputes are resolved outside the courtroom. Such methods include mediation (an independent third party is brought in to mediate a dispute) and arbitration (the dispute is referred to a third party for a binding decision).

In Ontario, the *Rules of Civil Procedure* mandate and regulate mediation in civil cases commenced in Toronto, Windsor and Ottawa. Mediation remains common in other parts of Ontario, and parties to a dispute will often agree to non-binding mediation by mutually selecting a mediator. Arbitration may be pursued on an ad hoc basis under a structure provided for in the local jurisdiction or under local statutory provisions.

Alternatively, arbitration may be conducted under the administrative and supervisory powers of one of the recognized international arbitration institutes, such as the International Court of Arbitration of the International Chamber of Commerce in Paris, the London Court of International Arbitration or the American Arbitration Association. These bodies do not themselves render arbitration awards, but they do provide a measure of neutrality and an internationally recognized system of procedural rules.

One advantage of arbitration compared to domestic court procedure is the confidentiality of arbitration proceedings. The arbitration process is normally private; hearings are not public and written transcripts of proceedings are not generally available to the public. In addition, the arbitration process may be faster than the court system, and there is generally no right of appeal from an arbitration award. This may lead to disputes being resolved more quickly.

Electronic Discovery

The discovery and production of electronically stored information, commonly called e-discovery, is now a standard process for litigants in almost every matter across Canada. A national committee first produced the Sedona Canada Principles in 2008 to establish national guidelines for electronic discovery. These guidelines are thought to be compatible with the rules of procedure in each of the Canadian territories and provinces. The most recent, Third Edition, of the Sedona Canada Principles, was published in 2022, to account for the ubiquity of e-discovery and the proliferation of new technologies and types of data.

Since 2010, parties in Ontario have been required to formulate and adhere to a discovery plan to address all aspects of the discovery process, including the exchange of electronic documents. The parties are expressly required to consult and have regard to the Sedona Canada Principles when preparing their discovery plan. The following principles are among the most significant recommendations of Sedona Canada:

— **Preservation.** Once litigation is reasonably anticipated, the parties must consider their obligations to take reasonable and good-faith steps to preserve potentially relevant electronically stored information.

— **Co-operation.** Parties should co-operate in developing a joint discovery plan to address all aspects of discovery and should continue to co-operate throughout the discovery process, including the identification, preservation, collection, processing, review, and production of electronically stored information.

— **Proportionality.** In any proceedings, the parties should ensure that the steps taken in the e-discovery process are proportionate to the nature of the case and the significance of the electronic evidence in the case.

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BANKRUPTCY AND RESTRUCTURING

By Jamey Gage

BANKRUPTCY AND RESTRUCTURING

Introduction

Insolvency proceedings in Canada may take a variety of different forms. However, when a corporation becomes insolvent, two options are generally available: (i) restructure the business of the corporation, either through a compromise of its liabilities or through a going-concern sale, or (ii) liquidate the corporation's assets for the benefit of its creditors.

WHEN A CORPORATION BECOMES INSOLVENT, TWO OPTIONS ARE GENERALLY AVAILABLE: (I) SELL AS A GOING CONCERN OR LIQUIDATE THE CORPORATION'S ASSETS FOR THE BENEFIT OF ITS CREDITORS, OR (II) RESTRUCTURE THE BUSINESS OF THE CORPORATION.

Under Canadian constitutional law, the federal government has exclusive legislative control over bankruptcy and insolvency matters and different legislative regimes are available to effect either a restructuring or a liquidation of a corporation. The *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) are the two most common federal statutes employed for these purposes. The BIA provides for both restructurings (via BIA proposals) and liquidations (via bankruptcies) of insolvent businesses, while the CCAA is used primarily for the restructuring of more complex corporate businesses, although it can also be used to conduct a liquidation.

Bankruptcy and Insolvency Act (BIA)

Bankruptcy

The term "bankruptcy" refers to a formal procedure under the BIA which allows a licensed insolvency trustee to liquidate a debtor's assets, determine creditors' claims and distribute the proceeds of the liquidation to creditors. A bankruptcy can either be voluntary or involuntary and can be brought in respect of any insolvent person that has an office, assets or carries on business in Canada, with the exception of banks, insurance companies and trust or loan companies, for which other federal insolvency legislation exists (the *Winding-up and Restructuring Act*).

Voluntary Bankruptcy

A voluntary bankruptcy under the BIA commences when a debtor files an assignment in bankruptcy with the Office of the Superintendent of Bankruptcy (OSB).

Involuntary Bankruptcy

An involuntary bankruptcy under the BIA commences when a creditor with a debt claim of at least C$1,000 files an application with the court for a bankruptcy order against the debtor. This proceeding is brought on behalf of all creditors, although it is not necessary for more than one creditor to join in the application. In order for a creditor to obtain a bankruptcy order, the creditor must prove, on a balance of probabilities, that it is owed at least C$1,000 on an unsecured basis and the debtor has committed an "act of bankruptcy" within six months preceding the filing of the application. The most common act of bankruptcy is the debtor failing to meet its liabilities generally as they become due.

In addition to being placed into bankruptcy pursuant to a court order made upon application by a creditor, a debtor can also be placed into bankruptcy under the BIA if its proposal (discussed below) is rejected by its unsecured creditors or is not approved by the court. A proposal may also fail and result in the debtor's bankruptcy if the debtor does not fulfil the terms of the proposal or otherwise fails to fulfil its obligations under the BIA.

Trustee in Bankruptcy and its Role

The practical effect of a bankruptcy is the same whether it is commenced voluntarily or involuntarily: the debtor's assets automatically vest in the trustee in bankruptcy, subject to the rights of secured creditors, trust claimants, and 30-day suppliers. A trustee in bankruptcy must be a Licensed Insolvency Trustee (LIT), which is an insolvency professional or firm that has been granted a licence by the OSB.

The trustee has many duties, the most important of which is to liquidate the debtor's assets for the benefit of its creditors. In addition, the trustee is responsible for the administration of claims asserted against the bankrupt estate in accordance with the relevant provisions of the BIA. If appropriate, the trustee may also investigate the affairs of the debtor to determine whether the debtor carried out any fraudulent conveyances, preferences, transfers at undervalue or improper dividends prior to the bankruptcy.

The creditors will generally meet shortly after the debtor becomes bankrupt and are entitled to appoint a group of up to five individuals known as "inspectors" to work with and supervise the trustee. With the approval of the inspectors, the trustee may sell the debtor's assets.

A corporation may not be discharged from bankruptcy unless all of the provable claims against it have been satisfied, which may occur by payment in full or pursuant to a successful BIA proposal.

Stay of Proceedings

There is an automatic stay of proceedings by unsecured creditors of the debtor upon the commencement of the debtor's bankruptcy proceedings, which prevents unsecured creditors from enforcing their rights against the debtor or its property. However, the stay does not affect secured creditors, who are generally free to enforce their security outside the bankruptcy process unless the court otherwise orders (which is exceedingly rare).

Restructuring: BIA Proposal and Going-Concern Sales

The restructuring provisions under the BIA (as compared to the CCAA) are most commonly used for smaller, less complicated businesses. This means small- and medium-sized corporations tend to use the BIA process rather than the CCAA process (discussed below), to seek to restructure their obligations to creditors or conduct a going-concern sale. A restructuring under the BIA is commenced by a debtor filing either a proposal (e.g., its restructuring plan) or a notice of intention to make a proposal (NOI).

Upon the filing of an NOI or the filing of the proposal itself, the BIA imposes a stay of proceedings against the exercise of remedies by creditors against the debtor's property or the continuation of legal proceedings to recover claims provable in bankruptcy. The specific stay language is set out in the BIA. Provisions in security agreements providing that the debtor ceases to have rights to use or deal with the collateral upon either insolvency or the filing of an NOI have no force or effect. The BIA also provides that, upon the filing of an NOI or the filing of a proposal, no person may terminate or amend any agreement with the insolvent person or claim an accelerated payment under any agreement with the insolvent person simply because the person is insolvent or has filed an NOI or a proposal. The court may lift a stay in a BIA restructuring if the creditor is able to demonstrate that it will be "materially prejudiced" by the stay or if it is equitable to do so on other grounds.

It is more common for a debtor to start the process by filing an NOI, rather than by filing a proposal immediately. If the debtor files an NOI, a copy of the written consent of an LIT, consenting to act as the proposal trustee in the proposal proceedings, must be attached to the NOI. If an NOI is filed, the debtor must file cash-flow statements for its business within 10 days and must file its proposal within 30 days (unless the time is extended). The court can extend the time for filing a proposal for up to a maximum of five additional months, although the court can only grant extensions for up to 45 days at a time.

During the process, the debtor normally carries on its business as usual, subject to monitoring by its proposal trustee and the supervision of the court.

BIA Proposal

During the BIA proposal process, the debtor may present a proposal to its creditors. The BIA requires certain terms in the proposal for the court to approve it, including: (i) the payment of preferred claims (such as certain types of employee claims) in priority to claims of ordinary creditors; (ii) the payment of all proper fees and expenses of the proposal trustee relating to the proceedings; (iii) the payment of certain tax remittances, such as employee source deductions, within six months of the approval of the proposal; and (iv) the payment to the proposal trustee of all consideration to be paid out under the proposal, for distribution to creditors.

A proposal must be made to the unsecured creditors generally, either providing for all unsecured creditors to be placed into one class or providing for separate classes of unsecured creditors. A proposal may also be made to secured creditors in respect of any class or classes of secured claims. A proposal that provides for payment of equity claims cannot be approved by the court unless it provides that all claims that are not equity claims are to be paid in full.

A proposal is deemed to be accepted by the creditors if all classes of unsecured creditors vote for the acceptance of the proposal by a "double majority" — a majority in number of the unsecured creditors, holding at least two-thirds in value of the claims in each class (other than equity claims). Parties related to the debtor cannot vote in favour of the proposal. In practice, a proposal is typically only directed at the unsecured creditors. Secured creditors are usually dealt with by individual negotiation, since there must be a commonality of interest among creditors grouped together as a class and there are seldom multiple secured creditors that can be grouped on this basis. Therefore, there is often little practical benefit to addressing secured claims within the proposal.

If the proposal is approved by the creditors, it must then be approved by the court. When deciding whether to approve the proposal, the court must be satisfied that, among other things, the proposal is reasonable, calculated for the benefit of creditors and meets the technical requirements of the BIA. If a BIA proposal is not approved by the requisite "double majority" of unsecured creditors or not approved by the court, the debtor is automatically placed into bankruptcy.

Finally, if after receiving court approval of the proposal the debtor defaults in its performance of the proposal, the court may annul the proposal, which then leads to an automatic bankruptcy of the debtor.

BIA Sale as a Going Concern

As an alternative to tabling a proposal and seeking the agreement of creditors to compromise their claims, the debtor may pursue a sale as a going concern. The sale process runs on a parallel, alternate track to the restructuring process with a view to maximizing value for the stakeholders. In such circumstances, approval of the sale must be sought from the court on notice to the affected secured creditors, among others, in a process similar to a court receivership sale.

***Companies' Creditors Arrangement Act* (CCAA)**

The CCAA is most commonly used to restructure larger, more complicated businesses. Therefore, the CCAA is often the preferred statute for larger-sized corporations seeking to restructure or to conduct a going-concern sale.

To be eligible to obtain relief under the CCAA, the debtor must be a company (as defined in the CCAA), have outstanding liabilities of C$5 million or more, and be insolvent, bankrupt, or have committed an act of bankruptcy under the BIA.

Initial Application

A CCAA proceeding is generally commenced by a debtor company bringing an initial application to the court for an order (referred to as the Initial Order), imposing a stay of proceedings on creditors (i.e., a freeze on the payment of indebtedness) and authorizing the company to prepare a plan of arrangement to compromise its indebtedness with some or all of its creditors. The materials presented to the court on an initial application include: (i) a cash-flow forecast of the debtor; (ii) the debtor's recent financial statements; (iii) a proposed form of Initial Order; and (iv) an affidavit prepared by the company describing its background, its financial difficulties and the reasons why it is seeking the protection of a court order made under the CCAA.

After reviewing the materials and hearing submissions from counsel, the presiding judge will exercise his or her discretion to decide whether to grant an Initial Order and, if so, on what terms. There is significant judicial discretion, and therefore flexibility, as to the scope of the stay of proceedings and other terms in the Initial Order, since specific language for such terms are not prescribed in the CCAA. Usually, the Initial Order is made in the form of the order requested by the company, with little or no input from creditors and other stakeholders. In most jurisdictions, there is a form or order that has been adopted as a model upon which Initial Orders in that jurisdiction are based with a view to creating greater consistency in CCAA proceedings. Certain relief can only be granted on notice to secured creditors likely to be affected thereby (for example, interim financing) and, in any event, affected parties have the right to apply to the court to vary the Initial Order after it is granted.

Typically, an Initial Order does the following:

- authorizes the company to prepare a plan of arrangement to present to its creditors;
- authorizes the company to stay in possession of its assets and to carry on business in a manner consistent with the preservation of its assets and business;
- prohibits the company from making payments in respect of past debts (other than any specific exceptions allowed by the court, such as amounts owing to employees) and imposes a stay of proceedings by secured and unsecured creditors: (i) preventing creditors and

suppliers from taking action in respect of debts and payables owing as at the filing date; and (ii) prohibiting the termination of most types of contracts by counterparties;

— appoints a monitor (who must be a Licensed Insolvency Trustee (LIT)) to monitor the business and financial affairs of the company during the proceedings. As an officer of the court, the monitor must take into account the interests of all stakeholders and report on the debtor's reorganization progress from time to time;

— authorizes the company, if necessary, to obtain interim financing to ensure that it can fund its operations during the proceedings, including setting limits on the aggregate funding and the priority of the security (commonly known as "DIP financing"); and

— authorizes the company to disclaim unfavourable contracts, leases and other agreements, subject to some limited exceptions.

The CCAA provides that an Initial Order may only impose a stay of proceedings for a period not exceeding 10 days. The court's jurisdiction to provide relief pursuant to an Initial Order during this period is also limited to that which is "reasonably necessary for continued operations of the debtor company in the ordinary course of business." Once an Initial Order has been made, the company may apply for a further order or orders extending the stay of proceedings. The intention is to have the stay of proceedings continue until the company's plan of arrangement has been presented to the creditors and approved by the court or a sale has been implemented. On an extension application, the applicant must satisfy the court that: (i) it has acted in good faith and with due diligence; and (ii) the circumstances remain appropriate for the continuation of the CCAA proceedings.

As a general matter, the duration of proceedings under the CCAA usually ranges between six to 18 months from the commencement of proceedings to the implementation of a plan of arrangement. However, the proceedings can be much quicker if the terms of the plan of arrangement have already been worked out in advance of the filing. The court may terminate the proceedings under the CCAA, upon application of an interested party, if the court believes that it is unlikely a consensual arrangement will be achieved or that the continuation of the proceedings is otherwise not appropriate. However, such orders are rare, at least at the initial stages of a restructuring.

On November 1, 2019, the CCAA was amended to include an express duty of good faith for any "interested person" in a CCAA proceeding. If the court finds that an interested person has failed to act in good faith, it has broad discretion to make any order it considers appropriate in the circumstances.

Plan of Arrangement

A plan of compromise and arrangement is the restructuring plan put forward by a company to its creditors. When a CCAA plan of arrangement is developed, it ordinarily will divide the creditors into classes and will provide for the treatment of the pre-filing claims of each class (which can be substantially different between classes). The classification of creditors must be approved by the court prior to any creditor meeting on the plan. In this regard, the guiding legal principle set out in the CCAA and applied by the courts in considering classification issues is whether there is a commonality of interest among the creditors in the class.

> WHEN A CCAA PLAN OF ARRANGEMENT IS DEVELOPED, IT ORDINARILY WILL DIVIDE THE CREDITORS INTO CLASSES AND WILL PROVIDE FOR THE TREATMENT OF EACH CLASS.

For a plan of arrangement to be approved by the affected creditors, a majority in number of the creditors representing two-thirds in value of the claims of each class (other than equity claims), present and voting (either in person or by proxy) at the meeting or meetings of creditors, must vote in favour of the plan of arrangement. Parties related to the company cannot vote in favour of the plan. If the plan of arrangement is approved by the creditors, it must then be approved by the court. In doing so, the court must determine that the plan of arrangement is "fair and reasonable." Upon implementation of the plan following its approval by the creditors and court, the plan of arrangement is binding on all of the creditors of each class affected by the plan. Typically, the plan will provide for the release of the debtor company from the claims of affected creditors.

The court cannot approve a plan if it does not provide for the payment in full of certain Crown claims and certain employee and pension liabilities, or if it does not, in effect, subordinate "equity claims" to the claims of creditors. A plan may include releases in favour of non-debtor third parties in certain cases.

Additionally, if a debt restructuring involves a reorganization of the share capital of a company, it is possible to reorganize the share capital of the company by way of the CCAA court order approving the plan, without a shareholder vote. In recent years this device has been used, in effect, to extinguish the existing share capital and issue new shares to creditors in satisfaction of their claims or to a new equity investor (whose investment may fund distributions to the creditors).

If a CCAA plan is not approved by the requisite "double majority" of creditors, there is no automatic bankruptcy of the debtor company. Typically, what may lead to the bankruptcy of the debtor is the court's refusal to extend, or a decision to terminate, the stay of proceedings against the debtor company, thereby allowing creditors to exercise their lawful remedies against the debtor company. If a sale of the assets occurs without a CCAA being proposed, consideration would be given to the benefits of proceeding toward a plan (presumably, to distribute the proceeds of the sale) as opposed to terminating the CCAA proceedings, for example, by commencing bankruptcy liquidation proceedings.

Asset Sales

During CCAA proceedings, the debtor company typically continues to carry on business as usual. A debtor is entitled to continue to sell assets in the ordinary course of business without an order of the court. However, significant transactions outside the ordinary course of the debtor's business typically require court approval.

The CCAA may be used to conduct the sale of particular assets of the company or the sale of its entire business as a going concern as an alternative to a restructuring by way of a plan of arrangement. The sale process runs on a parallel, alternate track to the restructuring process with a view to maximizing value for the stakeholders. In such circumstances, approval of the sale must be sought from the court on notice to the affected secured creditors, among others, in a process similar to a court receivership sale.

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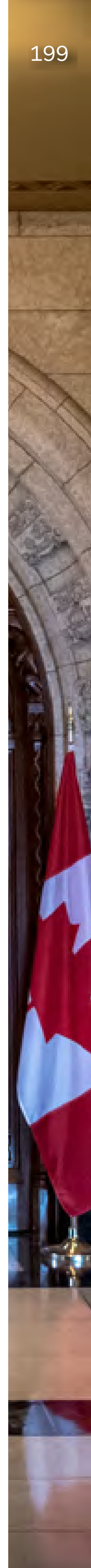
GOVERNMENT RELATIONS

By Awi Sinha, Adam Goldenberg and Amanda Iarusso



GOVERNMENT RELATIONS

In Canada, legislative power is divided between Parliament (the federal legislature) and provincial legislative assemblies. Each of these branches of government is based on the British parliamentary model, in which the political party with the most members elected to Parliament or to the provincial legislative assembly typically forms the government. See **Canada**.

Usually, the governing party that forms the federal or provincial government holds a majority of the seats in the federal or provincial legislature and governs through a Cabinet of appointed "ministers." This tends to reduce the relative influence of individual elected members of the legislature, as it is rare that members of the governing party vote against a government-supported initiative. However, at the federal level, there were a series of "minority governments" between 2004 and 2011, in which the governing party held more seats than any other party in Parliament, but did not hold a majority of the seats. As a result, the relative influence of members of Parliament increased during that time. After a series of "majority governments" were elected from 2011 to 2019, the results of the last two federal elections (in 2019 and 2021) have been minority governments.

Coalition governments between two or more parties have not yet occurred at the federal level in Canada, although that tactic has been more widely discussed between federal political parties in recent years. In March 2022, the governing Liberal Party, which held a minority of seats in the federal Parliament, entered into a "supply-and-confidence" agreement with the opposition New Democratic Party. The parties agreed to co-operate on key priorities and to keep the Liberal government in office until June 2025, though the agreement is not enforceable; nothing prevents the New Democrats from withdrawing from the agreement and supporting a vote of no confidence in the Liberal government, which (if successful) would force the government's resignation and precipitate early elections. At different times in recent decades, a number of provinces have been governed by similar arrangements between parties.

Given the significant role that the federal and provincial governments play in the Canadian economy, every enterprise operating in Canada should consider a government relations strategy. Companies may also engage with governments through industry associations. This may be a practical necessity for companies active in industries that are heavily regulated (such as telecommunications, pharmaceuticals, transportation, and energy); that can be greatly affected by government policy (such as manufacturing and agriculture); or that sell to the government (such as defence and information technology companies).

Government relations work, which includes lobbying, is generally focused on outreach to government employees, the ministers who form the executive council (i.e., Cabinet) in each province and federally and their staffs, and members of the legislature who are part of the governing party. Depending on the concern, enterprises may also choose to lobby members of opposition parties in order to have matters raised in the legislature or at a committee of the legislature. This can be particularly important when a minority government is in power.

GOVERNMENT RELATIONS WORK IS NEEDED WHEN AN ENTERPRISE SEEKS TO INITIATE, SUPPORT, OR OPPOSE LEGISLATIVE INITIATIVES, OR SEEKS A CHANGE IN REGULATION OR POLICY.

Government relations work is needed when an enterprise seeks to initiate, support, or oppose legislative initiatives, or seeks a change in regulation or policy. A number of government ministries and regional or political interests may be involved with any given initiative or change, and the enterprise may seek meetings with all the responsible senior government employees and ministers. For example, enterprises involved in interprovincial trucking operate within a regulatory environment that includes provincial and federal ministries of transportation, industry and commerce, and labour. Likewise, private development of hydroelectric power projects usually requires contact with provincial ministries of energy, lands and environment, as well as the federal ministries of fisheries and oceans, and environment. It also may be necessary to engage the senior elected member of the governing political party who is “politically responsible” for a given region, as any given initiative or change can affect regions differently.

Two areas of notable interest for government relations are relationships with Indigenous Peoples and the Canadian system of environmental assessments (EA), which is required for major projects approvals.

In the case of the group of Indigenous Peoples known as First Nations (the other two groups are the Métis and the Inuit), the First Nations themselves will likely need to be consulted when major projects are planned, as they may retain some claim to Aboriginal title or hold traditional Aboriginal rights in relation to the land. These rights vary across Canada, depending on historical and legal developments. Where First Nations interests are involved, both the federal and provincial governments will also have to be advised and consulted. See **Aboriginal Law**.

In the area of EA, Canada requires comprehensive environmental assessments when projects involving land use reach a certain threshold of invested capital or when certain types of projects are involved. If the project is under federal jurisdiction (such as interprovincial pipelines), environmental assessments fall under the *Impact Assessment Act* (IAA). Enacted in 2019, the IAA creates a comprehensive process for assessing the effects of projects designated for assessment by the federal government and determining whether the designated project would serve the public interest. The stated objectives of the IAA include the consideration of environmental, social, health and economic factors. If the project is strictly within a single province and federal jurisdiction is not involved, generally only the provincial EA process will apply. In some cases, both federal and provincial EA processes apply. A number of provinces, led by Alberta, have challenged the IAA's constitutionality and that challenge is currently before the Supreme Court of Canada. A decision is expected in late 2023 or early 2024.

There may be significant differences in the complexities and timelines of the EA process imposed by a particular provincial government and the process Imposed by federal government. As such, most enterprises considering investments above the applicable EA threshold in any Canadian jurisdiction should develop an early and positive relationship with the appropriate levels of government so their eventual EA application does not come as a surprise or become controversial. See **Environmental Regulation**.

Investors in Canada should be aware that, compared to the United States, Canada's federal and provincial governments are much more active in the delivery of certain services such as health care, utilities, infrastructure, and broadcasting. Investors should seek advice on the attitudes of government toward investments in these and other fields before proceeding, as co-ordination and co-operative relationships with government will lead to much more effective and efficient decision-making. This is also true of sectors in which there have recently been notable shifts in the regulatory environment. These include: residential real estate, in which foreign investment has increasingly been restricted and regulated in an effort to stabilize Canada's housing market (see **Real Property**); cannabis, which was legalized federally in October 2018 and which is significantly regulated at both the federal and provincial levels (see **Cannabis**); and critical minerals, in the exploration, extraction, and processing of which foreign enterprises may face heightened regulatory scrutiny (see **Foreign Investment Law & National Security**).

Lobbying is legal in all Canadian jurisdictions but is also subject to strict reporting and registration laws. Scrutiny of lobbying activities has been a particularly sensitive political issue in Canada over the past few years. Enterprises need to be mindful of the high standards expected of those engaged in lobbying efforts.

Codes of conduct for public officials regulate the public officials and not those interacting with them. Such codes of conduct govern what activities a public official may engage in, as well as the hospitality he or she may accept, if any. An enterprise should, for example, avoid inadvertently placing public officials in a conflict-of-interest position that could impede that official from being involved with a given issue and also bring negative attention to the enterprise's government relations effort.

Separate codes of conduct regulate lobbyists and their interactions with public officials. An amended code of conduct for lobbyists came into force on July 1, 2023. It creates new disclosure requirements and revised limits around gifts and hospitality. The new version of the code uses broader language to restrict the circumstances in which a registered lobbyist may lobby a public official, prohibiting the lobbying of officials who could "reasonably have a sense of obligation" toward the lobbyist. The new code also makes clear that all of its prohibitions and requirements extend to grassroots communication.

The regulation of those in the private sector who interact with public officials in Canada is generally governed by lobbying legislation. Such legislation provides that businesses and their employees may need to register their government relations activities with a central registry. This central registry is available to the public (usually through the internet). Federal and provincial lobbyist legislative schemes distinguish between in-house lobbyists (both for businesses and for organizations) and external consultant lobbyists. Businesses and organizations are required to register in respect of their in-house lobbying activities when their paid employees collectively devote a significant amount of time to regulated communications with public officials. The precise threshold for registration varies by jurisdiction and may change over time as legislation is amended.

The registration of lobbyists has come under increasing scrutiny in almost every jurisdiction in Canada. The Parliament of Canada and every provincial legislature has enacted lobbyist legislation. Some cities, such as Toronto and Ottawa, also have bylaws requiring individuals that lobby municipal politicians and government employees to register. Lobbying activities in other cities, such as St. John's, in the Province of Newfoundland and Labrador, and Montréal and Québec City, in the Province of Québec, are regulated by provincial lobbying legislation.

The types of communication that may require registration vary from jurisdiction to jurisdiction. Broadly speaking, they include: communications with public officials (which includes not only politicians, but also many government employees) with respect to the development of legislative proposals; the introduction, passage, defeat or amendment of legislation; the making or amending of any legislation; the development or amendment of any policy or program; the awarding of any grant, contribution or other financial benefit; and, in some cases, the awarding of contracts and the arrangement of meetings with public officials.

Unlike the United States, Australia, and other jurisdictions, Canada does not have a foreign agent registry. However, the federal government launched public consultations on the concept in March 2023 and is expected to move forward with its creation. Such a registry would likely require persons or entities acting on behalf of a foreign state to declare any activities intended to influence Canadian government policies, officials, or democratic processes.

A well-planned government relations strategy can lead to a productive and professional relationship with responsible decision-makers in government. Both industry and public officials benefit from such relationships because they ensure that all the facts relevant to a government decision are expressed, understood and taken into account. Governments in Canada will generally do their best to be responsive, transparent and effective in addressing the needs of enterprises. However, when engaging public officials, it is essential for an enterprise to know and follow the rules.

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GOVERNMENT PROCUREMENT

By John Boscariol and Ljiljana Stanic

GOVERNMENT PROCUREMENT

Each year, federal, provincial, territorial and municipal governments in Canada purchase more than C$150 billion in goods and services.

Federal Procurement

Procurement by the federal government is subject to the requirements of the *WTO Agreement on Government Procurement* (WTO-AGP), Chapter 5 of the *Canadian Free Trade Agreement* (CFTA), Chapter 19 of the *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the European Union, Chapter 19 of the interim *Trade Continuity Agreement* (TCA) between Canada and the United Kingdom, and Chapter 15 of the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP and, collectively, the Trade Agreements). The leading legislation and policies that apply to federal contracts for goods and services include the *Financial Administration Act, the Government Contracting Regulations*, the *Directive on the Management of Procurement*, the *Department of Public Works* and *Government Services Act* and the Standard Acquisition Clauses and Conditions (SACC) Manual. Most purchasing for line departments is done by Public Services and Procurement Canada (PSPC).

These commitments bind nearly all federal government departments and Crown corporations. While not every Trade Agreement is applicable to every procurement, where there is overlap, the most stringent commitment is applicable. Canadian suppliers are protected under every Trade Agreement that is applicable to a particular procurement.

Notably, the *Canada-United States-Mexico Agreement* (CUSMA), which replaced the *North American Free Trade Agreement*, does not contain procurement obligations that bind Canada or any sub-federal government (and provides no benefits to Canadian entities operating in the United States or Mexico). While suppliers from the United States and Mexico no longer enjoy the additional benefits and coverage of the former NAFTA procurement chapter, they still enjoy the protections under the WTO-AGP. Mexican suppliers are also covered by the procurement obligations under the CPTPP.

Provincial and Territorial Procurement

Provincial and territorial government tendering practices and contract awards (including tendering by provincial crown corporations, and municipalities, school boards, publicly funded academic, social service and health (MASH Entities) are subject to a number of obligations in certain, but not all, Trade Agreements. Notably, these governments are subject to extensive obligations under the CFTA, CETA and the CPTPP. These governments are also subject to obligations under the WTO-AGP, though the scope of the WTO-AGP is more heavily restricted and applies to fewer crown corporations and MASH Entities. Provinces are also subject to the *Canada-United States Agreement on Government Procurement*, which both confirms the obligations of the provincial entities under the WTO-AGP and provides certain exemptions and protections to Canadian entities bidding on U.S. government contracts under the *Recovery Act*.

Each province and territory has its own separate legislation, with varying degrees of complexity and formality. For example, in Ontario, the *Ministry of Government Services Act* requires the provincial government to follow the policies and directives established by the Management Board of Cabinet when undertaking procurements relating to the construction, renovation or repair of a public work. The Ministry of Government Services is responsible for developing the procurement policy framework for the Government of Ontario, including guidelines. Ontario recently adopted a single point of procurement for provincial purchasing through Supply Chain Ontario.

Procurement policies in Ontario presently include an electronic tendering system, no preference for local vendors and a conflict-of-interest policy. Ontario has passed new legislation, *Building Ontario Businesses Initiative Act, 2022*, that, once in force (on a date to be named), will require Ontario's public sector buyers to give preference to Ontario businesses (as will be defined in regulations) when procuring goods and services under a certain threshold to be stipulated in the regulations. Consultations regarding the proposed regulations to this act are underway. Further, procurements by broader public sector entities including school boards and hospitals are subject to the requirements of the Ontario Broader Public Sector Directive, which includes a Supply Chain Code of Ethics and 25 mandatory requirements. One of these requirements is compliance with Ontario's commitments under the Trade Agreements.

Municipal Procurement

Municipal contracting processes are generally governed by common law and codified in municipal purchasing bylaws, contracting policies and purchasing procedures. Some provincial legislation such as the Ontario *Municipal Act* requires municipalities to maintain policies related to the procurement of goods and services.

In addition, the commitments made under various Trade Agreements, most notably CETA and the CFTA, bind many municipal procurements.

Comprehensive Economic and *Trade Agreement* and the *Trans-Pacific Partnership*

Canada has implemented the CETA, which has significantly opened up provincial, utility and municipal procurements to European suppliers. This improved access applies to all Canadian suppliers, including Canadian suppliers that are subsidiaries or affiliates of foreign entities. The CETA imposes significant standards on the conduct of tendering processes and contract awards for federal, provincial and municipal procurements. The primary procurement obligations common to all the Trade Agreements include: non-discrimination based on country and/or province of origin; an open, transparent tendering process; a competitive procurement; and a fair procurement process.

THE PRIMARY PROCUREMENT OBLIGATIONS COMMON TO ALL THE TRADE AGREEMENTS INCLUDE: NON-DISCRIMINATION BASED ON COUNTRY AND/OR PROVINCE OF ORIGIN; AN OPEN, TRANSPARENT TENDERING PROCESS; A COMPETITIVE PROCUREMENT; AND A FAIR PROCUREMENT PROCESS.

Canada has also implemented the CPTPP, which imposes further standards on the procurement process. A central aim of the CPTPP is to prevent procuring entities from discriminating between suppliers in the 11 Pacific Rim member countries. The CPTPP requires Canadian federal, provincial and territorial governments to, among other things, use electronic procurement measures, ensure that notices of intended procurement are widely accessible and provide suppliers with minimum time periods to respond to such notices. Suppliers should note that Canadian governments are not required to follow standardized procurement procedures when contracts fall below certain prescribed monetary thresholds, or when the subject matter of the contract is exempt from these procedures. The monetary thresholds are different for each of the Trade Agreements, may fluctuate year to year, and vary depending on the type of contract and in some cases the identity of the procuring entity.

Following the completion of Brexit, the United Kingdom was no longer covered by the CETA procurement obligations. However, Canada concluded an interim *Trade Continuity Agreement* with the United Kingdom that preserves CETA's terms, including with regard to government procurement, pending conclusion of negotiations (expected to finish in 2024) for a new, comprehensive trade agreement between Canada and the United Kingdom, and the entry into force of that agreement. On March 21, 2023, the United Kingdom announced the conclusion of negotiations on its accession to the CPTPP. The accession will enter into force once it has been ratified by the United Kingdom and the other CPTPP members, which is expected to happen in the second half of 2024.

Defence Procurement and the Controlled Goods Program

With regard to Canadian defence procurement, the *Defence Production Act* (DPA) gives the Minister of PSPC the responsibility to administer the DPA and the exclusive authority to buy or otherwise acquire defence supplies and construct defence projects required by the Department of National Defence. There are security requirements for individuals, facilities and controlled goods and technology. The Industrial Security Program provides security screening services for government contractors before they are entrusted with protected and classified information and assets of the government. The Controlled Goods Program is Canada's national domestic industrial security program and prevents the proliferation of tactical and strategic technology and assets, including missile technology, military equipment and related intellectual property. McCarthy Tétrault LLP is registered to receive controlled goods and technology under the Controlled Goods Program. The Joint Certification Program protects unclassified military critical technical data from common adversaries but allows the data to be transmitted to private U.S. and Canadian entities that have a legitimate need for them.

There are two important points to note regarding defence procurement. First, such procurement is generally not covered by any of the Trade Agreements except for the CFTA. There is consistent law that the only way to benefit from the provisions of the CFTA is to bid through a Canadian entity — it is insufficient for a Canadian company to be a subcontractor on the team, or even be the entity that will ultimately enter into the final form of contract.

Second, many high value defence procurements will be subject to national security exemptions. These exempt the procurement from the obligations of the Trade Agreements and remove them from the jurisdiction of the Canadian International Trade Tribunal. Challenges regarding such procurements must instead be structured around claims of breach of public or private law duties in a judicial review brought in Federal Court or relevant provincial court.

Tendering Formats

There are a myriad of procedures available for federal procurement, ranging from formal tendering to negotiated procurements. Practically speaking, the leading forms of procedure are requests for proposals, standing offers and supply arrangements. Short listing by way of requests for qualifications may be used in more complex, high-value solicitations. Specifications should be drafted in such a manner that competition is maximized, unless a restrictive requirement is necessary to meet the government's legitimate operational needs. Procurement laws generally provide that to be considered for an award, a bid must comply with all mandatory requirements in the request for proposal. In general, an award is to be made to the qualified bidder whose bid is responsive to the terms of the request for proposal or solicitation and is more advantageous to the government considering only price and the non-price related factors included in the bid document. Bidders who are debarred, suspended or declared ineligible may not receive a contract award.

A number of provinces (including both Alberta and Ontario) have created frameworks to accept and engage with Unsolicited Proposals (USPs). These frameworks are targeted at large-scale infrastructure projects and allow for suppliers to make proposals to the province regarding potential projects without an RFP being issued beforehand. These frameworks contain stringent requirements to ensure that the purchaser obtains value for money for the taxpayer and stays compliant with all Trade Agreements and other public procurement obligations. Depending on the circumstances, the province may accept the USP outright, it may enter into negotiations with the supplier, it may reject the USP, or it may use the USP to ground a full competitive process.

A number of Crown corporations and other provincial entities are beginning to experiment with progressive procurement structures in their P3 projects. These are designed to foster collaboration between the owner and the contracting partner to help define project requirements, and design and price in a development phase following a competitive selection process.

The Integrity Regime

To be eligible to do business with the federal government, bidders must comply with PSPC's Integrity Regime (Integrity Regime). Under the Integrity Regime, suppliers are ineligible to bid on contracts when they, or their board members, have been convicted or discharged in the last three years for any of the following offences under Canadian law:

- payment of a contingency fee to a person to whom the *Lobbying Act* applies;
- corruption, collusion, bid-rigging or any other anticompetitive activity under the *Competition Act*;
- money laundering;
- participation in activities of criminal organizations;
- income and excise tax evasion;
- bribing a foreign public official;
- offences in relation to drug trafficking;
- extortion;
- bribery of judicial officers;
- bribery of officers;
- secret commissions;
- criminal breach of contracts;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.

All suppliers are required to provide a certification on bidding that the company, its directors, and its affiliates, and their directors, have not been charged, convicted, or absolutely/conditionally discharged of any of the above offences or similar foreign offences in the past three years. As part of this certification, all suppliers will be required to provide a disclosure of all foreign offences similar to the above-listed offences that they or their affiliates and their directors have been convicted of in any foreign jurisdiction. This is a disclosure requirement that necessitates rigorous diligence and monitoring systems to allow for speedy disclosure at the time of bidding. Providing false or misleading certifications is, in and of itself, cause for debarment.

Suppliers who are debarred from bidding are ineligible to bid for 10 years from the date of determination. However, if a debarred supplier addresses the root cause of the offence or fully co-operates with government authorities, it can obtain a reduction in this debarment time. The length of the debarment may be reduced by up to five years but will also require an administrative agreement whereby law enforcement may monitor the supplier's ongoing behaviour.

The debarment period runs in perpetuity for those suppliers that are convicted of committing fraud against the federal government under either the *Criminal Code* or the *Financial Administration Act*. All such suppliers will be permanently debarred until a record suspension is obtained.

The federal government also has the ability to suspend a supplier for up to 18 months immediately upon that supplier being charged with or admitting guilt to any of the above-listed offences or a similar foreign offence or until charges or pleas resolve such offences. The Integrity Regime does not explicitly extend this suspension provision to violations by affiliates of the supplier.

The Integrity Regime prohibits suppliers from subcontracting with debarred entities. Knowingly entering into such a subcontract will debar the supplier for five years. This prohibition is likely to be assessed on the basis of strict liability and, as such, all contractors should implement due diligence procedures specifically directed at the compliance of any potential subcontractor with the Integrity Regime.

If an affiliate of a supplier has committed one of the above-listed offences or a similar foreign offence, PSPC can debar the supplier. The Integrity Regime requires that the affiliate be assessed by an independent third party retained by the supplier to determine whether the supplier had any participation or involvement in the underlying offence. If the supplier can show that it had no such involvement, it will not be debarred. Entities are deemed to be affiliates when one controls the other, when both entities are controlled by a common third party or where direct control does not exist between the entities, but various prescribed indicia of control are present.

The federal government retains the ability to grant limited public interest exceptions to the requirements under the Integrity Regime. These can only be granted where a debarred supplier must be retained, and no other reasonable options exist. Factors that influence the granting of a public interest exception include the inability of other suppliers to actually perform the contract, emergent circumstances, national security concerns or potential material injury to the financial interests of the government if the exception is not granted. A permanently debarred supplier is not eligible for this exception.

If, during the course of an ongoing supply contract, the supplier is convicted of one of the above-listed offences or a similar foreign offence, the federal government is entitled to terminate the contract. The federal government is not obligated to terminate the contract and suppliers are entitled to submit arguments as to why the contract should not be terminated. In the event that the federal government chooses not to terminate the contract, it must put in place an administrative agreement providing for independent third-party monitoring of the contract.

In late 2018, the Canadian government started consultations on wide-ranging changes to the Integrity Regime. The planned changes would increase flexibility in the system contingent on wrongdoers coming forward voluntarily, admitting fault and taking measures to remediate. The changes would also greatly expand the scope of debarring offences to include, among other things, violations of sanctions legislation, being convicted of an offence resulting in a supplier being listed on the Environmental Offenders Registry or engaging in behaviour that would "bring the federal procurement into disrepute or otherwise be contrary to Canadian public policy." These changes have not yet been implemented into Canadian law as of the date of publication.

Bid Challenges and Complaints

Purchasing undertaken by the federal government is subject to Canada's bid-challenge regime under the jurisdiction of the Canadian International

Trade Tribunal (CITT), which is authorized to investigate compliance of federal purchasing entities with the Trade Agreements. The CITT requires that a complaint be filed within 10 working days of the date the complainant knew of, or should have known of, the grounds for the complaint.

If the CITT determines that a solicitation, proposed award or contract award does not comply with statute or an international trade treaty requirement, it may recommend that the contracting entity, usually PSPC, implement any combination of the following remedies: terminate the contract; issue a new solicitation; award a contract; or award damages for lost profits. It may also recommend that the contracting agency pay all of the complainant's bid and proposal preparation costs and all costs associated with filing and pursuing the protest.

Provincial and municipal authorities have their own bid-protest mechanisms. British Columbia, Alberta, Saskatchewan and Manitoba have a specific Bid Protest Mechanism (BPM) that governs any procurements by those provinces. Suppliers alleging a breach of CETA, the CFTA, or other applicable Trade Agreements can seek recourse through the BPM.

Other provinces do not have a specific complaint mechanism, and complainants are likely to be required to seek redress through judicial review. This was recently demonstrated in Ontario when a European supplier complained to the Director of Supply Chain Ontario that its rights under the CETA were violated by a Ministry of Transportation Procurement. When the Director denied the complaint, the Divisional Court took up an application for judicial review that both quashed the Director's decision and the underlying procurement as violating the commitments of Ontario under the CETA.

Federal and provincial superior courts may also hear claims by bidders that the solicitations have been carried out in breach of their common law rights in contract or tort. All procurements by federal, provincial and municipal entities are subject to the jurisdiction of the courts and to the concept of "Contract A" and "Contract B" under common law. The courts have held that when a compliant bidder responds to a tender call, a notional contract called "Contract A" is formed. One of the terms of "Contract A" is that the bidder, if selected, is required to honour the terms of its bid by entering into "Contract B," which is the contract to perform the work in question. However, during the bidding process, the parties are governed by the explicit rules in the tendering documents. The purchasing government entity is also subject to a number of implied duties to "Contract A" bidders, including to conduct a fair competition, provide proper disclosure, reject non-compliant tenders, award the contract to the winning bidder and award the contract as tendered.

In recent years, purchasing entities have increasingly attempted to avoid forming "Contract A" by drafting "non-Contract A" bid solicitations. If no "Contract A" is formed, the resulting duties do not arise, and no breach of contract claim for damages can be brought. In addition, this process gives more latitude for bidders and purchasers to engage in a negotiated RFP process. While such a process would usually seem to eliminate a major source of liability, bidders should be aware of two key issues. First, even if there is an express disavowal of "Contract A" in the solicitation, courts have found that, under certain circumstances, "Contract A" can be formed. Second, where no "Contract A" is formed, there is an increased likelihood that the procurement may be challenged via an administrative judicial review process.

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CANNABIS

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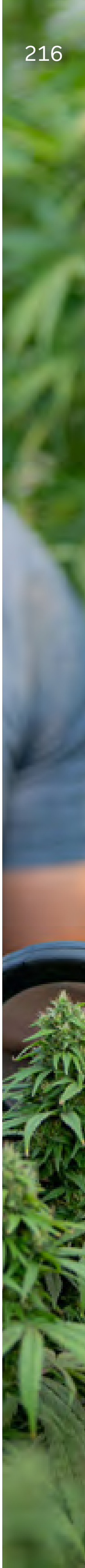


CANNABIS

With the enactment of the *Cannabis Act* (Canada) in 2018, Canada became the first G7 nation to federally legalize adult use of recreational cannabis permitting its production, distribution and sale. Since that time, the regulatory regime has evolved and the cannabis industry has continued to grow at a rapid rate, both domestically and internationally.

Licensing

Responsibility for the oversight of the cultivation, production and distribution of cannabis is shared between federal, provincial and territorial governments and municipalities. Health Canada provides licensing and a legal framework for the cultivation and production of cannabis through various licences. An individual or business is required to obtain a licence issued by Health Canada in order to conduct various cannabis-related activities, including the cultivation of cannabis, the sale of cannabis for medical purposes, analytical testing and research, with various sub-licences being available based on the nature and size of the activity. Licence holders must comply with the *Cannabis Act* and its regulations, as well as compliance with other applicable federal, provincial and territorial legislation and municipal laws.

Licences related to distribution are issued at a provincial and territorial level. The distribution of cannabis varies by province and territory through private sales, government sales or a hybrid of the two.

Infused Products

At the time of legalization, product offerings were primarily limited to dried cannabis flower and cannabis oils, due to a strict regulatory environment. Subsequently, the federal government introduced new regulations to permit a much wider range of cannabis-infused products, including edibles, extracts suitable for vaping products, and topicals. The regulations provide for strict production parameters and guidelines with respect to these products, including limits on THC and certain ingredients and additives, and restrictions on the use of vitamins, mineral nutrients, meat products, caffeine and alcohol.

Branding, Packaging and Labelling

Cannabis and cannabis accessories are prohibited from being sold in packaging or with a label: (i) if it could reasonably be expected to appeal to minors (i.e., those under 18 years of age); (ii) that sets out a testimonial or endorsement; (iii) that depicts a person, character or animal; (iv) that is associated with any particular lifestyle; or (v) that contains any information that is false, misleading, deceptive or likely to create an erroneous impression about its characteristics.

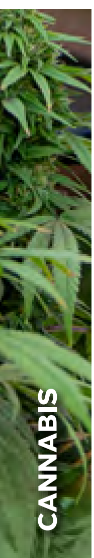
It is also prohibited for cannabis to be sold if it has not been packaged in accordance with the packaging and labelling requirements set out in the applicable legislation. Those packaging and labelling requirements vary between the classes of cannabis and address characteristics of the package or container itself (e.g., capacity, surface colours and displays, scent, bar codes, etc.) as well as the label applied to it (e.g., product characteristics, producer information, brand elements, expiry date, ingredient list, health warnings, etc.).

Promotion

The *Cannabis Act* provides for broad and stringent restrictions on the promotion of cannabis, cannabis accessories and cannabis-related services, subject to certain narrow exceptions. Many of the provinces' and territories' legislation and policies impose additional promotion restrictions on top of those set out the *Cannabis Act* and its regulations. These restrictions are imposed in the interest of protecting the health and safety of Canadian citizens, with a particular emphasis on minors.

The *Cannabis Act* defines the term "promote" as the making of a representation (other than on a package or label) in respect of an item or service, for the purposes of selling that item or service, by any means, whether directly or indirectly, that is likely to influence attitudes, beliefs and behaviours about the item or service.

There are certain activities that are not intended to be caught by the scope of the promotion restrictions and which are expressly stated as being outside of their scope of applicability: (i) certain creative works, commentaries and opinions that depict or address cannabis, a cannabis accessory and/or a cannabis-related service but for which no consideration is given; and (ii) business-to-business promotions by persons authorized to produce, sell or distribute cannabis and persons who sell cannabis accessories and/or cannabis-related services that are directed at persons authorized to produce, sell or distribute cannabis (and not at consumers).



Fundamentally, it is prohibited to promote cannabis, cannabis accessories and any cannabis-related service unless otherwise authorized under the *Cannabis Act*. The statute goes on to confirm that there can be no communications of price or availability, testimonials or endorsements, depictions of persons or characters or animals, implication of a particular emotion or lifestyle, or any other representation that could be appealing to minors.

In addition to the core prohibition, the *Cannabis Act* and its regulations provide other supporting restrictions, including, among other things, prohibitions on: (i) falsely, deceptively or erroneously promoting cannabis, cannabis accessories or cannabis-related services or their traits (which is considered by Health Canada to include any claims about intended effects of consumption); (ii) using foreign media channels to promote in Canada in a non-compliant manner; (iii) sponsoring persons or events in particular ways; (iv) naming a facility in a particular way; and (v) sellers of cannabis and/or cannabis accessories doing or providing anything as an inducement for the purchase of cannabis or cannabis accessories (e.g., "buy one get one free" promotions, contests, loyalty programs, etc.), subject to an exception for certain business-to-business inducements (e.g., wholesale discounts).

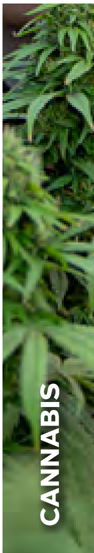
Despite the restrictions, the *Cannabis Act* also provides several narrow channels of permitted promotions, namely:

— **Informational promotion.** A promotion through which factual information is conveyed to consumers about cannabis, a cannabis accessory, a cannabis-related service or the item or service's characteristics (including price or availability), subject to certain delivery parameters;

— **Brand-preference promotion.** A promotion of cannabis, a cannabis accessory or a cannabis-related service by means of its brand characteristics, subject to certain delivery parameters;

— **Point-of-sale promotion.** A promotion by the applicable seller of cannabis, a cannabis accessory or a cannabis-related service at the point of sale where the promotion conveys only its availability and/or price; and

— **Brand elements on non-cannabis items.** A promotion of cannabis, a cannabis accessory or a cannabis-related service by means of placing a



brand element on an item that is not cannabis or a cannabis accessory; provided that the applicable item not: (i) be associated with minors; (ii) be reasonably considered appealing to minors; (iii) be associated with a particular lifestyle; or (iv) exceed certain numerical, placement and size parameters set out in the *Cannabis Regulations*.

Any person is permitted to engage in informational promotions and brand-preference promotions in respect of cannabis accessories and cannabis-related services, but only persons who are authorized to produce, sell or distribute cannabis can do so in respect of cannabis. Any such informational and brand-preference promotions must, among other things: (i) be communicated to a person 18 years of age or older and identifies them by name; (ii) be in a place where minors are not permitted by law; or (iii) be communicated by means of telecommunication where reasonable steps have been taken to ensure that minors cannot access it.

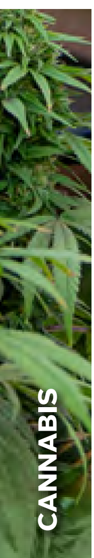
Beyond the federal restrictions and authorizations described, many of the provinces and territories impose supplementary restrictions that compound the promotional difficulties faced by industry participants. Evidently, promotion capabilities are heavily restricted within Canada and require careful navigation when trying to implement a promotional initiative.

Mergers and Acquisitions

Similarly to other highly regulated industries, transactions involving cannabis industry participants require the navigation of certain idiosyncrasies. In addition to all of the traditional considerations that should be accounted for in the context of any corporate transaction, cannabis industry participants must evaluate the impact of certain factors that are unique to their industry and that have the potential to significantly impact the prospects of their businesses once a transaction is completed.

The following are some of the primary considerations that must be considered in the context of mergers, acquisitions and securities transactions (e.g., capital raises) involving cannabis industry participants:

— **Licence Transferability.** The licences issued under the federal, provincial and territorial legislation to cannabis industry participants are not independently transferable to another person. This fact influences



the structure of any particular transaction in that licences may only effectively be transferred through the purchase and sale of the entities that hold them (i.e., a share purchase transaction). In the context of an asset purchase transaction, including in which a facility that is the subject of a licence, the licence in question will not automatically flow with ownership of the purchased assets. The purchaser of the facility would effectively have to reapply for the licence that was held by the seller in respect of the purchased facility should it be desired.

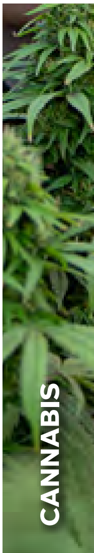
— **Regulator Consent and Notice Rights.** Cannabis-related regulators have inserted themselves into the transaction process in several ways. Applicable legislation, the regulators' imposed policies and/or commercial agreements between industry participants and the regulators (e.g., supply agreements with provincial and territorial wholesalers) frequently provide the regulators consent and notice rights that must be abided by in the context of a transaction. These rights can serve as conditions that must be satisfied prior to closing or post-closing obligations. In either case, their stipulation has afforded regulators certain enforcement powers that can be exercised where the industry participants' obligations are not fulfilled.

— **Security Clearance and Personal Disclosure.** When a person acquires a significant ownership interest in a licence-holding entity, they may be obligated (in the case of licensed producers) to obtain security clearance under the federal legislation or (in the case of licensed retailers) to provide significant personal disclosure to applicable provincial and/or territorial regulators, similarly to their respective licensing processes. As previously described, the level of personal detail required to be disclosed in both such processes is very significant and may be considered untenable by individuals associated with a purchaser.

— **Ownership Restrictions.** Certain provinces prohibit licensed producers from acquiring significant ownership interests in licensed retailers. These restrictions must be carefully navigated where industry participants want to achieve a degree of vertical integration.

Securities Regulation

As previously noted, the legalization of cannabis at the federal level in Canada stands in contrast to the regulatory framework in the United States. Although a number of U.S. states have legalized cannabis in some



form, it remains a controlled substance under federal law. The Canadian Securities Administrators (CSA) have published guidance for companies with U.S.-based cannabis activities, and the Toronto Stock Exchange (TSX) undertook a listing review of cannabis companies with U.S. operations and maintains that its issuers are not permitted to participate in marijuana-related activities in the U.S. The Canadian Securities Exchange, in contrast to the TSX, has taken a more permissive approach, requiring only fulsome disclosure of these activities (consistent with the position of the CSA).

The Year in Review and Outlook

During 2022, there were several significant developments in the Canadian cannabis industry:

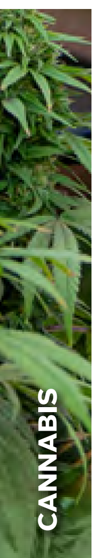
— In December 2022, Health Canada announced amendments to the *Cannabis Act* and accompanying regulations to do, among other things, the following: (i) to increase the public possession (and purchase) limits for cannabis beverages from 2.1 litres (five cans of 355 millilitres each) to 17.1 litres (48 cans of 355 millilitres each); and (ii) to update the regulation of non-therapeutic research with human participants to allow for the easier conduction of cannabis research involving human participants.

— Beginning in 2021, certain licensed producers introduced "edible extract" products into the recreational market in order to try and benefit from the higher THC allowances for extracts relative to edibles. In or around late-2022, Health Canada began asking some of the relevant licensed producers to stop selling their products out of a concern for non-compliance.

— Health Canada began its legislative review of the *Cannabis Act* (which was supposed to begin the year prior after three years of legalization), and which industry stakeholders hope will be the catalyst for progressive industry changes.

— In July 2022, Health Canada's Science Advisory Committee on Health Products Containing Cannabis released a report on their findings to date, which will likely serve a guiding resource in the preparation of any legislation that legalizes and regulates health products containing cannabis or that otherwise updates the regulatory framework applicable to CBD.

— The Alcohol and Gaming Commission of Ontario provided clarifying guidance on what business-to-business inducements would be



permitted between licensed producers and licensed retailers. This included the express statement of an allowance for licensed retailers to contract licensed producers to producer retailer-branded products.

While there have been a variety of significant updates to Canada's cannabis industry in recent months, the future is unpredictable due to the industry's inherent volatility. Given the relatively difficult financial circumstances that have been faced by industry stakeholders for the past several years, most stakeholders hope to see developments in the way excise duty obligations are applied or further updates to the THC concentration limits applicable to edibles, extracts and topicals.

There is hope that the Canadian government will assist cannabis industry stakeholders in the short-term. Justin Trudeau, the Prime Minister of Canada, stated, "Now that we've got the public health and safety stuff out of the way, or on the way, I think you're absolutely right we should absolutely take a closer look at 'OK, what do we do then to make sure that this is a beneficial industry'?" As part of the 2022 federal Canadian budget, the federal government noted that as the legal cannabis industry in Canada grows, there are opportunities for the federal government to "streamline, strengthen, and adapt the cannabis excise duty framework specifically, and other excise duty regimes under the *Excise Act, 2001* accordingly." That work is being conducted, in part, by Innovation, Science and Economic Development Canada, a federal agency that focuses on increasing Canada's share of global trade. Such government assistance is required given the current sombre economic outlook in the industry which likely continue to lead to more strategic financing transactions, bankruptcy proceedings and consolidation among stakeholders.

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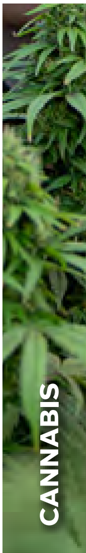

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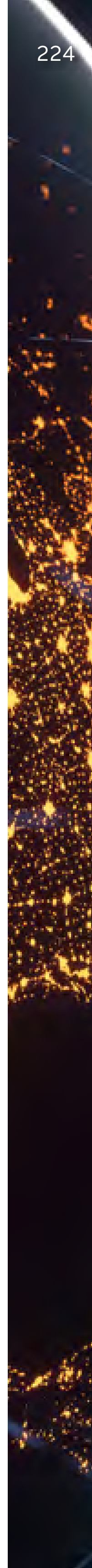

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